Supreme Court, U.S.
FILED
NOV 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 88-7351

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JEFFREY ALAN WALTON,

Petitioner,

v.

THE STATE OF ARIZONA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Arizona

BRIEF FOR PETITIONER

DENISE I. YOUNG
Arizona Capital
Representation Project
A.S.U. College of Law
Tempe, AZ 85287

*TIMOTHY K. FORD
MacDonald, Hoague & Bayless
1500 Hoge Building
Seattle, WA 98104
(206) 622-1604
Attorneys for Petitioner

**Counsel of Record*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

80pp

QUESTIONS PRESENTED

1. Whether Arizona's death penalty statute violates the Sixth Amendment by denying a jury trial on the factual elements of capital murder specified by state law?

2. Whether Arizona's capital sentencing statute violates the Eighth and Fourteenth Amendments by:

   a) requiring that death be imposed if the defendant fails to prove the existence of mitigating circumstances sufficiently substantial to call for leniency; and

   b) precluding the sentencer from considering mitigating circumstances unless the defendant has established their existence by a preponderance of the evidence?

3. Whether Arizona's "especially heinous, cruel or depraved" aggravating circumstance, as interpreted and applied by the Arizona courts, fails to channel the sentencer's discretion as required by the Eighth Amendment?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. The Offense	3
B. Petitioner's Trial	4
C. The Aggravation/Mitigation Hearing	9
D. The Appeal	13
I. ARIZONA LAW VIOLATES THE SIXTH AMENDMENT BY DENYING CAPITAL DEFENDANTS THE RIGHT TO "TRIAL, BY . . . JURY" ON THE FACTUAL ISSUES GOVERNING THEIR ELIGIBILITY FOR A SENTENCE OF DEATH.	17
A. The Historic Province of the Jury in Criminal Trials.	18
B. This Court's Decisions Regarding Sentencing By Judges in Capital Cases.	23
C. The Continued Vitality of the Sixth Amendment.	26
II. THE ARIZONA STATUTE'S MANDATORY PRESUMPTIONS OF DEATH PRECLUDE THE INDIVIDUALIZED SENTENCING REQUIRED BY THE EIGHTH AMENDMENT.	29
A. The Burden to Establish Mitigating Circumstances.	30
B. The Statutory Presumption in Favor of Death.	33
C. The Removal of Sentencing Discretion.	36
D. The Application of the Statute in this Case.	38

Table of Contents Continued

	Page
III. THE APPLICATION OF ARIZONA'S "HEINOUS, CRUEL OR DEPRAVED" AGGRAVATING CIRCUMSTANCE TO THE FACTS OF THIS CASE VIOLATED THE EIGHTH AMENDMENT PRINCIPLES OF *GODFREY* V. *GEORGIA*, AND *MAYNARD* V. *CARTWRIGHT*.	39
A. The Arizona Statutory Language Places No Restraint on the Sentencer's Decision.	40
B. The Arizona Supreme Court's Review of the Application Of This Circumstance Has Provided No Principled Way To Distinguish The Few Cases In Which The Death Penalty Has Been Imposed From The Many In Which It Has Not.	42
C. The Application of This Circumstance in Petitioner's Case Underscores its Constitutional Infirmity.	44
CONCLUSION	48
APPENDICES:	
A. Arizona Statutory Provisions	1a
B. Sentencing Standards In Current Capital Punishment Statutes	5a

TABLE OF AUTHORITIES

Cases	Page
Addington v. *Texas*, 441 U.S. 418 (1979)	32
Adamson v. *Ricketts*, 865 F.2d 1011 (9th Cir. 1988)	*passim*
Baldwin v. *Alabama*, 472 U.S. 372 (1985)	37
Beck v. *Alabama*, 447 U.S. 625 (1980)	28
Booth v. *Maryland*, 482 U.S. 496 (1987)	37
Bushell's Case, 6 Howard's State Trials 999, Vaughn's Rep. 135 (1670)	20, 21, 22, 29
Caldwell v. *Mississippi*, 472 U.S. 320 (1985)	26, 37
California v. *Brown*, 479 U.S. 538 (1987)	26, 30
California v. *Ramos*, 463 U.S. 992 (1983)	26
Carella v. *California*, 109 S.Ct. 2419 (1989)	22
Cartwright v. *Maynard*, 822 F.2d 1477 (10th Cir. 1987)	41, 43
Crane v. *Kentucky*, 476 U.S. 683 (1986)	22
Duncan v. *Louisiana*, 391 U.S. 145 (1968)	20
Eddings v. *Oklahoma*, 455 U.S. 104 (1982)	31, 39
Franklin v. *Lynaugh*, 108 S.Ct. 2320 (1988)	37
Furman v. *Georgia*, 408 U.S. 238 (1972)	16, 18
Gardner v. *Florida*, 430 U.S. 349 (1977)	34
Georgia v. *Brailsford*, 3 U.S. (3 Dall.) 1 (1794)	23
Godfrey v. *Georgia*, 446 U.S. 420 (1980)	39, 41, 43, 48
Gregg v. *Georgia*, 428 U.S. 153 (1976)	16, 35
Hildwin v. *Florida*, 109 S.Ct. 2055 (1989)	15, 24, 25
Hitchcock v. *Dugger*, 481 U.S. 393 (1987)	29
Isaack v. *Clark*, 1 Rolle 126 (1613)	18
Jackson v. *Dugger*, 837 F.2d 1469 (11th Cir.), *cert. denied* 108 S.Ct. 2005 (1988)	34
Johnson v. *Mississippi*, 108 S.Ct. 1981 (1988)	46
Jurek v. *Texas*, 428 U.S. 262 (1976)	30
Knapp v. *Cardwell*, 667 F.2d 1253 (9th Cir.), *cert. denied* 459 U.S. 1055 (1982)	29
Lockett v. *Ohio*, 438 U.S. 586 (1978)	30, 34
Maxwell v. *Dow*, 176 U.S. 581 (1900)	19, 20
Maynard v. *Cartwright*, 108 S.Ct. 1853 (1988)	*passim*
McCleskey v. *Kemp*, 481 U.S. 279 (1987)	31, 37
McMillan v. *Pennsylvania*, 477 U.S. 79 (1986)	26, 27, 28

Table of Authorities Continued

	Page
Mills v. *Maryland*, 108 S.Ct. 1860 (1988)	16, 31
Morrissette v. *United States*, 342 U.S. 246 (1952)	23, 29
Mullaney v. *Wilbur*, 421 U.S. 684 (1975)	29
Patterson v. *New York*, 432 U.S. 197 (1977)	28
Patton v. *United States*, 281 U.S. 276 (1930)	23
Penry v. *Lynaugh*, 109 S.Ct. 2934 (1989)	30, 31, 37, 38, 39
People v. *Feagley*, 121 Cal.Rptr. 509, 535 P.2d 373 (1975)	23
Pinch v. *North Carolina*, 459 U.S. 1056 (1982)	37
Press Enterprise v. *Superior Court*, 464 U.S. 501 (1984)	23
Proffitt v. *Florida*, 428 U.S. 242 (1976)	23, 24
Rex v. *Poole*, Cases Tempore Hardwicke 23 (1734)	21
Sandstrom v. *Montana*, 442 U.S. 510 (1979)	15
Skipper v. *South Carolina*, 476 U.S. 1 (1986)	30
Sparf v. *United States*, 156 U.S. 51 (1895)	21, 23
Spaziano v. *Florida*, 468 U.S. 447 (1984)	15, 24, 25
Specht v. *Patterson*, 386 U.S. 605 (1967)	27
State v. *Adamson*, 136 Ariz. 250, 665 P.2d 972 *cert. denied*, 464 U.S. 865 (1983)	45
State v. *Austin*, 124 Ariz. 231, 603 P.2d 502 (1979) *cert. denied*, 446 U.S. 911 (1980)	47
State v. *Beaty*, 158 Ariz. 232, 762 P.2d 519 (1988) *cert. denied*, 109 S.Ct. 3200 (1989)	36, 37, 38
State v. *Carr*, 154 Ariz. 468, 743 P.2d 1386 (1987)	47
State v. *Cookus*, 115 Ariz. 99, 563 P.2d 898 (1977)	47
State v. *Cruz-Mata*, 138 Ariz. 370, 674 P.2d 1368 (1983)	47
State v. *Ferguson*, 119 Ariz. 55, 579 P.2d 559 (1978)	47
State v. *Graham*, 135 Ariz. 209, 660 P.2d 460 (1983)	47
State v. *Gretzler*, 135 Ariz. 42, 659 P.2d 1 *cert. denied*, 461 U.S. 971 (1983)	36
State v. *Hensley*, 142 Ariz. 598, 691 P.2d 689 (1984)	47
State v. *Hoover*, Ariz. Supreme Court No. CR87-0025 AP (August 22, 1989)	9
State v. *Jordan*, 137 Ariz. 504, 672 P.2d 169 (1983)	30
State v. *Jordan*, 126 Ariz. 283, 614 P.2d 825 *cert. denied*, 449 U.S. 986 (1980)	28
State v. *Knapp*, 114 Ariz. 531, 562 P.2d 704 (1977), *cert. denied* 435 U.S. 908 (1978)	41
State v. *Lamb*, 142 Ariz. 463, 690 P.2d 764 (1984)	47
State v. *Lujan*, 124 Ariz. 365, 604 P.2d 629 (1979)	45, 47

Table of Authorities Continued

	Page
State v. *Madsen*, 125 Ariz. 346, 609 P.2d 1046 *cert. denied*, 449 U.S. 873 (1980)	47
State v. *McGuire*, 131 Ariz. 93, 638 P.2d 1339 (1981)	47
State v. *Nash*, 143 Ariz. 370, 694 P.2d 222 *cert. denied*, 471 U.S. 1143 (1985)	47
State v. *Nass*, 76 Wa.2d 368, 456 P. 2d 347 (1969)	23
State v. *Poland*, 144 Ariz. 388, 698 P.2d 183 (1985)	47
State v. *Powers*, 154 Ariz. 291, 742 P.2d 792 (1987)	23
State v. *Quinn*, 290 Or. 383, 623 P.2d 630 (1981)	18, 29
State v. *Rankovich*, 159 Ariz. 116, 765 P.2d 518 (1988)	47
State v. *Rhymes*, 129 Ariz. 56, 628 P.2d 939 (1981)	47
State v. *Ring*, 131 Ariz. 374, 641 P.2d 862 (1982)	47
State v. *Rockwell*, ___ Ariz. ___, 775 P.2d 1069 (1989)	47
State v. *Rumsey*, 136 Ariz. 166, 665 P.2d 48 (1983)	43
State v. *Tison*, 129 Ariz. 526, 633 P.2d 335 (1981) *cert. denied*, 459 U.S. 882 (1982)	43
State v. *Tucker*, 157 Ariz. 433, 759 P.2d 579 (1988)	47
State v. *Vaughn*, 147 Ariz. 28, 708 P.2d 453 (1985)	47
State v. *Vickers*, 159 Ariz. 532, 768 P.2d 1177 (1989)	40
State v. *Walton*, 159 Ariz. 571, 769 P.2d 1017 (1989)	*passim*
State v. *Watkins*, 126 Ariz. 293, 614 P.2d 835 (1980)	47
State v. *Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978) *cert. denied*, 440 U.S. 942 (1979)	47
State v. *Wedge*, 293 Or. 598, 652 P.2d 773 (1982)	23
State v. *Williams*, 133 Ariz. 220, 650 P.2d 1202 (1982)	47
Stebbing v. *Maryland*, 469 U.S. 900 (1984)	33, 35
Sumner v. *Shuman*, 483 U.S. 66 (1987)	16, 29, 36, 37
Tedder v. *State*, 322 So.2d 908 (Fla. 1975)	24
Tison v. *Arizona*, 481 U.S. 137 (1987)	35
United States v. *Battiste*, 2 Sumner 240 (1835)	21
United States v. *England*, 347 F.2d 425 (7th Cir. 1965)	23
United States v. *Unruh*, 855 F.2d 1363 (9th Cir. 1987) *cert. denied*, 109 S.Ct. 513 (1988)	23
United States v. *Voss*, 787 F.2d 393 (8th Cir.) *cert. denied*, 479 U.S. 888 (1986)	23
Williams v. *New York*, 337 U.S. 241 (1949)	35
Woodson v. *North Carolina*, 428 U.S. 280 (1976)	28, 30, 32, 34, 37

Table of Authorities Continued

	Page
Zant v. *Stephens*, 462 U.S. 862 (1983)	17, 46
STATUTES:	
A.R.S. § 13-703(A)	18
A.R.S. § 13-703(C)	28, 30
A.R.S. § 13-703(D)	28
A.R.S. § 13-703(E)	*passim*
A.R.S. § 13-703(F)(6)	40, 43, 44, 47
A.R.S § 13-1105	2, 18
Fla. Stat. Ann. § 921.141(2)	24
28 U.S.C. § 1257(3)	10
OTHER AUTHORITIES:	
BEDAU, THE DEATH PENALTY IN AMERICA (3d ed. 1982)	35
BLACKSTONE'S COMMENTARIES (Lewis ed. 1897)	21
Fortescue, *De Laudibus Legum Angliae* (1468), in CARPENTER AND STAFFORD, READINGS IN EARLY LEGAL INSTITUTIONS (1932)	20
FORSYTH, HISTORY OF TRIAL BY JURY (1852)	21
HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (1951)	19
NANKELL & HARDY, THE ARBITRARINESS OF THE DEATH PENALTY (1987)	35
J. PROFFATT, A TREATISE ON TRIAL BY JURY (1877)	19
Rosen, *The 'Especially Heinous' Aggravating Circumstance in Capital Cases: The Standardless Standard*, 64 N.C.L. Rev. 941, (1986)	40, 41, 42
Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669 (1918)	21
STORY, COMMENTARIES ON THE CONSTITUTION (5th ed. 1891)	19
Wells, *The Origin of the Petty Jury*, 27 LAW QUAR. REV. 347 (1911)	18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-7351

JEFFREY ALAN WALTON,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

BRIEF FOR PETITIONER

OPINIONS BELOW

The trial judge's special verdict, finding aggravating circumstances and sentencing Petitioner to death, is unreported and appears at J.A. 59. The opinion of the Supreme Court of Arizona affirming Petitioner's conviction and sentence of death is reported in *State* v. *Walton*, 159 Ariz. 571, 769 P.2d 1017 (1989), and reproduced at J.A. 70.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3), the Petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the Supreme Court of Arizona was entered on February 2, 1989. A timely motion for reconsideration was denied on March 21, 1989. The Petition in this case was timely filed, on May 20, 1989.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the Constitution of the United States:

Article III, Section 2, Clause 3, which provides in part:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.

The Sixth Amendment, which provides, in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .;

The Eighth Amendment, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Due Process Clause of the Fourteenth Amendment, which provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

This case also involves Arizona Revised Statutes §§ 13-703 and 13-1105 (Supp. 1986), which are set forth in full in Appendix A to this Brief.

STATEMENT OF THE CASE

Petitioner Jeffrey Walton was sentenced to death at age 20, by Judge G. Thomas Meehan of the Superior Court of Pima County, Arizona, for the first degree murder of Thomas Powell.

A. The Offense.

In March 1986, Thomas Powell, a 23-year-old Marine, was home on leave in Tucson, Arizona. Tr. 12/12 at 43.[1] On the night of March 2, he borrowed his mother's car, "to go out and have a drink." Tr. 12/12 at 44. When he did not return by the next afternoon, his mother called the police. Tr. 12/12 at 47.

On March 7, 1986, Robert Hoover, 23, and his 16-year-old girlfriend, Sharold Ramsey, attempted a gunpoint robbery in a parking lot outside a Motel Inn in San Luis Obispo, California. Tr. 12/15p 119-20. The victim escaped and the robbers fled; as they ran they threw away a two-shot .22 caliber derringer, which police recovered. *Id.* On March 9, 1986, the car that Thomas Powell was driving the night he disappeared was recovered by San Luis Obispo police near the same Motel Inn. *Id.* at 119. In the car were found identification papers belonging to Hoover and Ramsey. *Id.* at 120.

The next night, March 10, 1986, detectives picked up Petitioner for questioning regarding Hoover and Ramsey, and Thomas Powell's disappearance. Tr. 12/12 at 51. Petitioner admitted knowing Hoover and Ramsey but initially denied knowledge of any crime against Mr. Powell. Tr. 12/15p at 39. However, he eventually broke down crying, and admitted involvement in a robbery in which Mr. Powell was shot by Robert Hoover and left in the desert. *Id.* at 63-64.

The interrogation ended when Petitioner agreed to take the police to the place where he believed Mr. Powell had been shot.

---

[1] The transcript of Petitioner's trial is in several separately numbered volumes. They are referenced in this Brief by date of the proceeding involved, and the page of the transcript on which the reference appears. The proceedings of one day of the trial, December 15, 1986, are reported in two separate volumes, one covering the morning session, and one the afternoon session; page references to these volumes are denominated Tr. 12/15a and Tr. 12/15/p, respectively. Documents not included in the Joint Appendix are referenced by state appellate record (r.) item number and page.

Id. at 84. Investigators were unable to find anything there in the darkness. Tr. 12/12 at 54-55. The next morning, however, they found Mr. Powell's body in the area. *Id.* at 55.

An autopsy showed the cause of death was a single .22 caliber gunshot wound to the head. Tr. 12/15a at 93.[2] The medical examiner concluded that the gunshot wound had not been immediately fatal because Mr. Powell had suffered several additional injuries, apparently as the result of exposure and attempts to walk away from the place where he was shot.[3]

On March 13, 1986, Robert Hoover and Sharold Ramsey were arrested in California. Tr. 12/15p at 120. During police questioning, both Hoover and Ramsey denied any involvement in the Motel Inn robbery. *Id.* at 103, 122. They admitted taking part in the robbery of Thomas Powell but said it was Petitioner who shot Mr. Powell. *Id.* at 101.

B. Petitioner's Trial.

Petitioner and Robert Hoover were jointly indicted, and prosecuted on four offenses in relation to Mr. Powell's death: first degree murder, armed robbery, kidnapping, and theft by control. J.A. 2-5. The cases were separated for trial but set before the same trial judge, the Hon. G. Thomas Meehan.[4]

---

[2] A ballistics examination of the bullet fragment taken from Mr. Powell linked it to the derringer Hoover and Ramsey threw away at the San Luis Obispo Motel Inn. Tr. 12/15a at 62.

[3] *See* Tr. 1/26 at 234-42. The medical examiner concluded that the gunshot wound had blinded Mr. Powell and probably rendered him initially unconscious. *Id.* at 239-40. He surmised that Mr. Powell awoke from unconsciousness, attempted unsuccessfully to walk through the desert, and sustained other injuries in that effort. *Id.* at 241-2.

[4] Sharold Ramsey was charged with similar crimes, but entered into a plea bargain—approved by Judge Meehan—whereby the homicide charges against her were dropped. Tr. 12/12 at 150.

The guilt phase of Petitioner's case was tried to a jury. The testimony and arguments took just under three days. The prosecution's case rested principally upon the immunized testimony of Sharold Ramsey and David Bilodeau and Petitioner's confession to the police.

Sharold Ramsey's testimony included the only detailed description of the offense.

Ms. Ramsey testified that she, Hoover, and Petitioner[5] had decided to commit a robbery on the afternoon of March 2, 1986. Tr. 12/12 at 99. The three had no money and no transportation. They traveled by bus and by hitchhiking. During one ride they smoked "a couple of joints" of marijuana. *Id.* at 110. In the parking lot outside a bar called "Terry and Zeke's" the three encountered Thomas Powell. When Mr. Powell came out of the bar, Hoover whistled, and the next thing Ramsey saw, Petitioner "had the gun on the man and just told him to get down and he put his stuff on top of the car." Tr. 12/12 at 116, 118. Then "I guess somebody told him to get up and get in the car." Tr. 12/12 at 120.

Hoover took the wheel of Mr. Powell's vehicle; Ramsey got in the passenger side; Petitioner got in the back seat with Mr. Powell. Tr. 12/12 at 121. Ramsey testified the drive was "[n]ot very long." Tr. 12/12 at 122. Her description of the events between the time the four drove away from the bar and their arrival at the place where Mr. Powell was later shot was undetailed:

> Q Was the man talking while you were driving where you finally went?
>
> A He was just answering questions because everybody was asking him questions about where he lived and stuff and if he had any money.

---

[5] Ramsey and David Bilodeau refer to Petitioner in their testimony as "Mike," as they knew him by the name of Michael Dickenson. Tr. 12/12 at 95; 12/15a at 8-9.

Q How much money did he have?

A I think $45 or something.

* * *

Q Besides answering questions that were being asked, what else did the man say?

A He said if we wanted he would just give us a ride somewhere and he wouldn't tell nobody.

* * *

Q How was the man acting when this was going on?

A Just scared.

Q How do you know he was scared, what was he saying, what was he doing?

A I don't know, you could just tell, I guess.

Tr. 12/12 at 122-23; J.A. 22-23.

After the four reached the eventual murder scene, Ramsey said, Petitioner "and the man got out and Rob [Hoover] and [Petitioner] . . . were just arguing about what they were going to tie him up with or whatever, and then Rob said he didn't care what he tied him up with, just hurry, and he got back in the car." *Id.* at 124-25. Again, her only description of Mr. Powell's demeanor or actions at this point was that "[h]e was scared." *Id.* at 125. When pressed by the prosecutor to elaborate on how she knew this, she said:

> I don't remember. I just told him not to be scared because he wouldn't be hurt and then he got out of the car and then I guess he just got back down on the ground, I don't remember.

Id.[6]

According to Ramsey, the discussion between Petitioner and Hoover ended when Hoover got into the car and Petitioner took

[6] The Arizona Supreme Court's opinion at one point states that Mr. Powell "begged the defendant not to kill him." J.A. 98. We can find no evidence supporting this statement.

Mr. Powell into the desert, instructing the others to turn up the car radio. *Id.* at 126. When Petitioner returned, according to Ramsey, he was alone "and he said that was loud. I asked him what was loud and he said it sounded like a rifle or something like that, I don't remember. And he said not to ask any more questions." *Id.* at 127-28.

Ramsey testified she, Hoover and Walton took the proceeds of the robbery and bought food. *Id.* at 128-29. During the next few hours, she said Petitioner made several statements about the homicide. In one of those statements, she quoted Petitioner as saying "he never seen a man pee in his pants before." *Id.* at 131.

On cross-examination, Ramsey acknowledged that, prior to their arrest, she and Hoover had discussed what they would do if they were arrested; she claimed that Hoover "just said to tell the truth." *Id.* at 157. She acknowledged that she entered into the plea agreement for her testimony only after a private meeting with her boyfriend Hoover, which was arranged by her attorney and the prosecutor. *Id.* at 202. Ramsey also admitted making several false statements (*Id.* at 148), including lies about "[p]retty much everything" in a statement to police shortly after the plea agreement was entered into. *Id.* at 194.

David Bilodeau testified that, late on the night of March 5, 1986, Petitioner came to his house and said "he had just shot someone and that he needed some dynamite" to destroy the stolen vehicle. Tr. 12/15a at 12-13. According to Bilodeau:

> [Petitioner] said they were sitting around drinking and he said the guy was wising off and he asked him a couple of times to knock it off and the guy didn't knock it off. So he just reached over and shot him.

Id. at 14. Bilodeau testified that Petitioner "told me he dragged [the body] . . . up underneath a tree." *Id.* at 15.[7] He also said

[7] On cross-examination, Bilodeau admitted that, in his original statement to the police, he had quoted Petitioner as saying "we

that, when he spoke with Petitioner, Petitioner seemed to him to be "in a daze . . . . I don't really know if he knew what he did." *Id.* at 49.

Bilodeau said he had "[m]aybe four or five" prior felony convictions (*Id.* at 50), and that federal charges were pending against him at the time he testified. *Id.* at 25. He denied that he was given any consideration for his testimony except for use immunity, but he acknowledged that the prosecutor who called him had assisted in obtaining his release from jail on traffic warrants and the return of money seized by police in a raid on his home. *Id.* at 38-42.

Two witnesses were called by the defense. One was Robert Hoover, who refused to answer questions, invoking the Fifth Amendment in response to every question after giving his name. Tr. 12/15p at 53. The other was Becky Bolanos, the younger sister of Petitioner's girlfriend, Theresa. Tr. 12/15p at 147. Becky was called to refute Ramsey's claim that the murder weapon belonged to Petitioner, and Hoover had no gun. Becky testified about a conversation she had overheard between Hoover, Ramsey and Petitioner, about two weeks before Petitioner's arrest. *Id.* at 151. In that conversation, she said Hoover and Ramsey had described how they had stolen a gun a few nights before "at a biker's party . . . ." *Id.* at 152.

The defense arguments to the jury focused principally on the credibility of the witnesses and their differing accounts of who actually shot Mr. Powell. Tr. 12/16 at 175. The prosecution's arguments, particularly on rebuttal, emphasized the irrelevance of this issue in light of the instructions on felony murder:

> [Q]uite frankly it doesn't matter legally whether he shot him or he pulled the trigger, whether Walton pulled the trigger or Hoover pulled the trigger or Ramsey pulled the trigger, it doesn't matter.

dragged him up a hill;" but he testified "it seems to me today that he said he dragged him up the hill." Tr. 12/15a at 27. Biolodeau finally said he "[c]ouldn't be positive" "[w]hether it was we or he." *Id.* at 30. He explained some of his difficulties in recall by saying his "mind was pretty foggy back then." *Id.* at 35.

Id. at 196.

> [I]f you find that the defendant acting together with Sharold Ramsey and Robert Hoover, committed or attempted to commit armed robbery and/or kidnapping, that's all they intended to do, they intended and attempted to commit and did commit armed robbery or kidnapping and a death results during the course of and commission of that offense, whether Mr. Walton or any of the other two accomplices involved intends that death or not, it is first degree murder.

Id. at 205; see also J.A. 37-40.

The trial court's instructions, which immediately followed these arguments, bore out the prosecution's position. They included definitions of both premeditated murder and felony murder committed in the course of a robbery or kidnapping. *Id.* at 218. The jury was given a verdict form which provided only for general verdicts of "guilty" or "not guilty" of first degree murder. *Id.* at 225.

In the course of their deliberations, the jurors sent out this question to the judge: "For a person to be guilty of felony murder, does he actually have to pull the trigger?" J.A. 43. The court answered that the jury should "review the felony murder instructions and the accomplice instructions." *Id.* The jury's general verdict of "guilty" followed. J.A. 44.

C. The Aggravation/Mitigation Hearing.

On January 26 and 27, 1987,[8] pursuant to Arizona law, Judge

[8] In the interim between the conclusion of Petitioner's trial and sentencing hearing, Robert Hoover was tried before Judge Meehan and convicted of first degree murder. Judge Meehan later sentenced Hoover to life imprisonment. *State* v. *Hoover*, Ariz. Supreme Court No. CR87-0025 AP (August 22, 1989).

Meehan convened an "aggravation mitigation hearing" without a jury. Tr. 1/26 at 232.

The prosecution argued at this hearing that the murder of Thomas Powell was accompanied by two aggravating circumstances: "one cruel and depraved and the other the act was committed for pecuniary gain." Its only witness at this phase of the case was Dr. Allen Jones, the medical examiner who conducted the autopsy on Mr. Powell's body. Dr. Jones's testimony elaborated on his conclusion that Mr. Powell had awakened from unconsciousness sometime after he was shot and then suffered additional injuries, dehydration, and exposure during several days in the desert before he died. *Id.* at 234-42. The trial court overruled the defense objections to this testimony saying it "certainly goes to cruelty under the aggravating circumstances factors . . . ." *Id.* at 232-33.

After Dr. Jones's testimony,[9] the court took up the prosecutor's objections to a defense attempt to call as a witness Larry Inman, the foreman of the jury which had convicted Petitioner. *Id.* at 248. Defense counsel made an offer of proof that Mr. Inman would testify the jury convicted Petitioner solely under the felony-murder rule, because it "never could decide on who pulled the trigger." *Id.* at 249. The prosecutor's objections to the proffer were sustained. *Id.* at 250.

The sole defense witness called in mitigation was Dr. David Barry Gurland, a psychiatrist. Tr. 1/27 at 260. Dr. Gurland said that his examination showed that Petitioner had a long history of drug abuse, which escalated around the time of this offense

[9] The prosecution was permitted to recall Dr. Jones the next morning, before the defense began its case. *Id.* at 252. This time, Dr. Jones testified he could not be certain whether or not Mr. Powell would have been conscious or unconscious immediately after the gunshot. *Id.* at 257. He also testified that death was not inevitable from the gunshot wound alone: "[d]epending on how soon after the shooting he would have received medical attention . . . it was a survivable wound." *Id.* at 254.

to "very regular[]" use of "alcohol, cocaine, amphetamines, these types of things . . . ." *Id.* at 265. Dr. Gurland testified that "those types of drug mixtures will certainly impair one's judgment," and that there was "some evidence that around this time there may very well have been some memory deficits or some blackout spells." *Id.* at 265. He also found Petitioner had a "passive-dependent personality" and

> tends to rely on things and people. He's not a leader. Tends to be more of a follower. Can probably be persuaded to act in certain ways to please others. That type of person.

Id. at 266. He connected Petitioner's drug usage to his "bizarre sexual background when he was a child."[10] He found "nothing that showed even in his previous criminal background that he was really of a violent nature." *Id.* at 267. On cross examination, Dr. Gurland said he agreed with the report of a Dr. Hinton, who had reported many of the same things, and concluded Petitioner was not legally insane under the M'Naghten standard. *Id.* at 275.

Defense counsel began his closing argument at this phase by reading off "factors that I think the Court can conclude from the evidence go to mitigation." *Id.* at 282. That specification included:

> the lack of flight and helping the officers find the body and cooperating. The mental state testified to by Dr. Gurland is the end result of a viscious [sic] set of circumstances . . . the sexual problems and difficulties and horror with his own mother . . . . Then I think there is substantial impair-

[10] This statement apparently referred to a Nebraska Department of Correctional Services Classification Study dated February 8, 1983, attached to the Presentence Report in this case. The study said that Petitioner reported he was sexually abused and severely physically beaten by his alcoholic mother between the ages of seven and thirteen. The study said the mother had refused to discuss this, so there was "no documentation" of it, except a social worker's report which contained an "implication that there may be some sexual problems with the mother and the offender." *Id.* at 3.

> ment shown at the time in question . . . . And I also think that there is evidence he did not do the shooting. The other mitigating factor that is important . . . is the age of the defendant.

Id. at 283-84. Counsel concluded by arguing against the State's claims of the existence of the statutory aggravating factors,[11] calling them "speculation." "To be a depraved, cruel person you have to know what was going on. And there is no indication that they knew." *Id.* at 285.

The prosecutor's argument focused on its claim that the murder was "cruel" within the meaning of the Arizona statute. It asked the court to envision the victim's experience during the "seven or eight or nine days that man is out in the desert," and "the things going through that man's mind as he was in that car." *Id.* at 287. The prosecutor also argued "[t]hat heinous and depraved is what [Walton] . . . does afterwards. I have never seen anybody pee in their pants before. Like this is an interesting, curious thing, this is how concerned he is." *Id.* at 291.

With regard to mitigation, the prosecutor argued that unless the defendant's age caused a "substantial impairment of judgment it is not a mitigating circumstance." *Id.* at 289.

> There are no mitigating factors. To the extent that the Court would consider there's any mitigating factors at all present, they are not substantial enough to call for leniency.

Id. at 292.

Immediately upon the completion of these arguments, Judge Meehan read into the record his written judgment.

---

[11] At the close of the prosecution's case in aggravation, and in a written memorandum submitted prior to the hearing, defense counsel had argued that the "pecuniary gain" aggravating factor had not been established because "the killing was not done in furtherance of the robbery" (Tr. 1/27 at 259) and there was "no evidence of an overall plan to rob and murder." R. 126, p. 480.

> The Court finds beyond a reasonable doubt, Mr. Walton, that you were the person that took the deceased, Mr. Powell, into the desert, put a gun to his head which resulted in his subsequent death.
>
> The Court not only finds that beyond a reasonable doubt but beyond any doubt in this Court's mind.
>
> The Court further has considered the following mitigating circumstances: your capacity to appreciate the wrongfulness of your conduct or to conform your conduct to the requirements of the law may have been significantly impaired but not so impaired as to constitute a defense to prosecution.
>
> The Court has also considered your age; the Court's also considered all other mitigating factors set forth in the presentence report and all other mitigating circumstances as stated by your attorney on the record this date.
>
> The court finds the following aggravating circumstances. Number one, that you committed the offense in an extremely heinous, cruel or depraved manner.
>
> Number two, that the offense was committed for pecuniary gain.
>
> The Court finds that there are no mitigating circumstances sufficiently substantial to call for leniency.
>
> Therefore it is the sentence of the Court as to count one, first degree murder, that you be committed to the custody of the Arizona State Department of Corrections, from there to be put to death in the manner prescribed by law.

J.A. 56-57.

D. The Appeal.

The Supreme Court of Arizona affirmed Petitioner's convictions and sentences. J.A. 111. It relied on its previous decisions to reject a variety of arguments that the Arizona death sentencing statute was unconstitutional. J.A. 92.

The court also upheld the application of the "heinous, cruel or depraved" aggravating circumstance in Petitioner's case. J.A.

97-100. In so doing, it rejected the State's argument that Mr. Powell's "physical anguish from the wound, exposure, and conscious suffering in the desert" supported this circumstance, because "Powell's survival and longevity were neither reasonably foreseeable nor intended . . . ." J.A. 98. However, it found "ample evidence that Powell suffered substantial mental anguish prior to his death," pointing to evidence that "Powell suffered great mental anguish during the car ride when his fate was uncertain and his final march into the desert when his fate had become certain." J.A. 97, 98.[12] The court also found that "[s]ome circumstances suggest that the present defendant also committed the offense in a depraved manner." J.A. 99. In this regard, the court pointed to the defendant's alleged statement, testified to by Sharold Ramsey, that he'd "never seen a man pee in his pants before." *Id.* Emphasizing that "a finding of any one of those three factors suffices to constitute an aggravating circumstance", the court affirmed. J.A. 99-100.

Two Justices concurred, noting the conflicting evidence on whether Petitioner or Hoover did the shooting, and the doubtful credibility of all the witnesses on both sides. J.A. 112-113. They suggested that the jury's confusion in this case underscored the need for a verdict form setting forth separately the jury's finding of felony- or premeditated murder. J.A. 114-115.

SUMMARY OF ARGUMENT

1. The Arizona capital punishment scheme denies defendants on trial for their life the centuries-old right to have a jury determine the fact of their guilt of a capital offense.

Arizona can constitutionally delegate the sentencing decision in capital cases to a judge. But under the Sixth Amendment it cannot assign to the judge the distinct threshold determination whether a defendant has committed an act that

[12] It was in this regard that the Arizona court stated, with no evidentiary basis we can find, that Mr. Powell "begged the defendant not to kill him." *Id.*

subjects him to a potential capital sentence. That determination involves a function traditionally within the exclusive province of the jury: making findings of specific, statutorily defined facts, regarding issues of *actus reus* and *mens rea*, which state law requires to be proved by competent evidence beyond a reasonable doubt in order to render a defendant eligible for a qualitatively harsher punishment.

The right to jury trial has always been understood to encompass the right to a determination of the facts defined by law as prerequisites to criminal punishment, by jurors, not judges. Lord Coke's Latin phrasing of this rule—"Ad quaestionem facti non respondent Judices; ad questionem legis non respondent Juritores"—had been settled law for almost two centuries when the Sixth Amendment was written. That principle has underlain the most fundamental rules of criminal procedure, from the historic decision in *Bushell's Case* that jurors could not be imprisoned for contempt for "falsely" acquitting, to the modern prohibitions against conclusive presumptions and directed verdicts in criminal trials.

This Court's decisions have never departed from this bedrock historic principle. The holding in *Spaziano* v. *Florida* that "[t]he Sixth Amendment never has been thought to guarantee a right to a jury determination of" "the appropriate punishment to be imposed on an individual" explicitly distinguished between sentencing and determining the question of "guilt or innocence". *Hildwin* v. *Florida* merely followed *Spaziano* in a case in which all the facts necessary to make the defendant eligible for a death sentence had been found by a unanimous jury.

The Arizona Supreme Court has sustained its law on the theory that *Spaziano* authorizes any and all factual issues regarding a defendant's eligibility for a death sentence to be resolved by judges alone. That cannot be, unless *Spaziano* has eliminated "'[the] factfinding function' which in a criminal case the law assigns solely to the jury." *Sandstrom* v. *Montana*, 442 U.S. 510, 523 (1979).

2. The Arizona death sentencing statute differs from any this Court has previously examined. In every case in which an Arizona judge makes a finding of an "aggravating circumstance," the law requires that death be imposed unless the defendant establishes, by a preponderance of the evidence, "mitigating circumstances sufficiently substantial to call for leniency." A.R.S. § 13-703(E). Three aspects of this procedure place it outside the Eighth Amendment bounds for capital sentencing schemes.

First, the Arizona law requires that claimed mitigating circumstances must be proved to exist, by a preponderance of the evidence, before they can be used to justify a sentence of less than death. This restricts the "sentencer's consideration of all mitigating evidence." *Mills* v. *Maryland*, 108 S.Ct. 1860, 1866 (1988).

Second, the statute creates a presumption that the death penalty should be imposed in every case where it can be. It does this although it also makes eligible for the death penalty a spectrum of homicides at least as broad as the Constitution permits. This reverses a historic judgment—evidenced by both the enactments of legislators and the actions of decisionmakers in capital cases throughout this country—that there should be "few cases in which [the death penalty] is imposed [and] . . . many cases in which it is not." *Gregg* v. *Georgia*, 428 U.S. 153, 198 (1976) (plurality opinion), *quoting Furman* v. *Georgia*, 408 U.S. 238, 313 (1972) (concurring opinion of Justice White).

Third, the Arizona statute is explicitly mandatory: it provides that the sentencer "shall" impose a death sentence wherever a single aggravating circumstance is found and the defendant fails to meet his statutory burden. This deprives the sentencer of the ability to determine in a given case "whether the death sentence is the appropriate sanction," *Sumner* v. *Shuman*, 483 U.S. 66, 78 (1987).

3. One of Arizona's "aggravating circumstances," sufficient to authorize a sentence of death, is a finding that "[t]he defendant committed the murder in an especially heinous, cruel, or depraved manner." In both its language and its application, this statutory provision is virtually identical to the Oklahoma provision struck down by this Court in *Maynard* v. *Cartwright*.

Like the Oklahoma statute, the vague terms of this provision are written in the disjunctive: a murder is a capital offense if the trial court simply finds that it was "depraved." Also like the Oklahoma court in *Maynard*, the Arizona Supreme Court has persistently defined the provision in "terms or phrases as prone to subjectivity and ambiguity as those they were meant to define" *Adamson* v. *Ricketts*, 865 F.2d 1011, 1031 (9th Cir. 1988) (en banc). Similarly like its Oklahoma counterpart, in reviewing this finding the Arizona "court appears to rely on whatever events are presented to it" and "to review the record for any actions or events that it believes to be especially heinous, cruel or depraved." *Id.* at 865 F.2d 1036.

The application of the "heinous, cruel, or depraved" factor in this case exemplifies its standardlessness. The trial court's sentencing order simply recited the statutory language, without specifying which statutory adjectives it found applicable to Petitioner's crime. The Arizona Supreme Court rejected the prosecution's principal argument in defense of the trial court's determination but upheld the finding of this factor, by pointing to facts which do not "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder," *Zant* v. *Stephens*, 462 U.S. 862, 877 (1983), in the State of Arizona. In Arizona, as in Oklahoma, this part of the statute has failed to control the arbitrary imposition of death.

I. ARIZONA LAW VIOLATES THE SIXTH AMENDMENT BY DENYING CAPITAL DEFENDANTS THE RIGHT TO "TRIAL, BY . . . JURY" ON THE FACTUAL ISSUES GOVERNING THEIR ELIGIBILITY FOR A SENTENCE OF DEATH.

Under Arizona law, the death penalty may be imposed only for the crime of first degree murder, accompanied by

"aggravating circumstances." The statutory definition of first degree murder is a broad one, encompassing all premeditated killings and many types of unintentional felony-murders. A.R.S § 13-1105. Without more, a conviction of first degree murder carries a life sentence, with parole eligibility in 25 years. A.R.S. § 13-703(A). However, if the prosecution additionally proves, beyond a reasonable doubt, that a first degree murder was accompanied by one or more of nine statutorily defined "aggravating circumstances," the range of permissible punishments is expanded to included execution by lethal gas. A.R.S. § 13-703(E).

In some respects, this statutory system resembles those enacted by several other states since *Furman* v. *Georgia*. However, in one crucial aspect it differs from all post-Furman laws this Court has examined: the defendant's eligibility to be considered for a death sentence, which depends on proof of an "aggravating circumstance," is decided by the trial judge alone, without any input from a jury. That encroachment on the right to trial by jury is unique to this statute and three other state capital punishment laws enacted since *Furman*.[13]

A. The Historic Province of the Jury in Criminal Trials.

The right to jury trial is perhaps the most deeply revered and distinctive feature of the system of justice that America inherited from its British traditions.[14] Predating the Constitution

---

[13] A fourth similar law, enacted by the state of Oregon, was struck down by that state's Supreme Court for this reason. *State* v. *Quinn*, 290 Or. 383, 623 P.2d 630 (1981).

[14] References in the Constitutions of Clarendon (1164) and the Magna Charta (1215) attest to the age of this institution. Wells, *The Origin of the Petty Jury*, 27 LAW QUAR. REV. 347 (1911). By the late 1500's, the jury was accepted in England as a fundamental check on the power of the monarchy. See *Isaack* v. *Clark*, 1 Rolle 126, 135 (1613).

> Mr. Hallam, in his Constitutional History of England . . . said that as early as the reign of Henry VII one of the essential checks upon royal power was that 'the fact of guilt or innocence on a criminal charge was determined in a public court . . . by a jury of twelve men. . . .'

Maxwell v. *Dow*, 176 U.S. 581, 609 (1900) (dissenting opinion of Mr. Justice Harlan).

by hundreds of years, the jury right was "peculiarly dear and inestimable" to the English colonists, who "established and cherished it as one of their dearest privileges, and in every enumeration of their rights and immunities, it takes a conspicuous place." J. PROFFATT, A TREATISE ON TRIAL BY JURY 120-121 (1877).

The British Crown's "depriv[ation] . . . in many cases, of the right of Trial by Jury" was an enumerated complaint of the Declaration of Independence.[15] So determined were the framers of the Constitution to prevent the recurrence of such deprivations in criminal cases, they took the unique step of writing two Clauses into the Constitution—one in Article III, Section 2, the other in the Sixth Amendment—setting forth that guarantee. The constitution of every state includes at least one similar passage. 2 STORY, COMMENTARIES ON THE CONSTITUTION, §§ 1779, 1780 (5th ed. 1891); HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 16-17 (1951).

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government . . . . The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be

---

[15] See PROFFATT, *supra*, at 121: "So dearly was [the jury right] . . . esteemed, and in almost every instance when popular action organized to check the encroachments of power, and when the grievances and abuses suffered were enumerated, we find a denial of this right loudly and conspicuously complained of, and in the redress demanded its integrity and guarantee are insisted on."

> tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of a single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.

Duncan v. *Louisiana*, 391 U.S. 145, 155-156 (1968).

From its earliest recognition in the law of England, the essential power and responsibility delegated to juries has been "to enquire and know upon their oaths, if the fact be so . . . ." Fortescue, De Laudibus Legum Angliae (1468), reprinted in CARPENTER AND STAFFORD, READINGS IN EARLY LEGAL INSTITUTIONS 347 (1932).

> For if the Judge, from the Evidence, shall by his own Judgment first resolve upon any Tryal what the fact is, and so knowing the Fact, shall then resolve what the Law is, and order the Jury penalty to find accordingly, what either necessary or convenient use can be fancied of Juries, or to continue Tryals by them at all? . . . [I]n these cases the Jury, and not the Judge, resolve and find what the fact is.

Bushell's Case, 6 Howard's State Trials 999, Vaughn's Rep. 135, 143-44 (1670).

> [T]he first ordinance adopted by the Plymouth Colony in 1623 was one declaring among other things that "all criminal facts" should be tried "by the verdict of twelve honest men to be impanneled by authority, in form of a jurye upon their oaths."

Maxwell v. *Dow, supra*, 176 U.S. at 609 (dissenting opinion of Mr. Justice Harlan).

> It may safely be said that at the time of the American Revolution the general principle was well established in English law that 'juries must answer to questions of fact

> and judges to questions of law. This is the fundamental maxim acknowledged by the Constitution.'

Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 677 (1918).[16]

> That Decantum in our Books, Ad quaestionem facti non respondent Judices, ad quaestionem legis non respondent Juratores literally taken is true . . . .

Bushell's Case, supra, Vaughn's Rep. at 149.

> The distinction between the province of the judge and that of the jury is, in the English law, clearly defined, and observed with jealous accuracy. The jury must in all cases determine the value and effect of evidence . . . . The law throws upon them the whole responsibility of ascertaining facts in dispute, and the judge does not attempt to interfere with the exercise of their unfettered discretion in this respect.

FORSYTH, HISTORY OF TRIAL BY JURY 282 (1852). Justice Story was thus on firm ground, when he called it "the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law." *United States* v. *Battiste*, 2 Sumner 240, 243 (1835).

---

[16] *See also* BLACKSTONE'S COMMENTARIES §§ 349-350 (Lewis ed. 1897):

> [T]he founders of the English law have with excellent forecast contrived . . . that *the truth of every accusation* . . . should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors. . . . So that the liberties of England cannot but subsist, so long as this *palladium* remains sacred and iniolate; not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it. . . .

(emphasis added). *Rex* v. *Poole*, Cases Tempore Hardwicke 23, 27 (1734), *quoted in Sparf* v. *United States*, 156 U.S. 51, 94 (1895):

> [I]t is of the greatest consequence to the law of England, and to the subject, that these pwers of the judge and jury be kept distinct; that the judge determines the law, and the jury the fact; and if ever they come to be confounded, it will prove the confusion and destruction of the law of England.

The basic premise that the factfinding function is assigned exclusively to the jury underlies some of the most fundamental rules of our criminal justice system. It was, for example, the foundation of the historic decision in *Bushell's Case* that jurors could not be imprisoned for "falsely" acquitting: "For if it be demanded, What is the Fact? The Judge cannot answer it . . . ." Vaughn's Rep. at 149. It also, as Justice Scalia recently explained, forms the bedrock upon which is built a whole panoply of rules respecting the relative powers and duties of judge and jury:

> The Court has disapproved the use of mandatory conclusive presumptions not merely because it "'conflict[s] with the overriding presumption of innocence with which the law endows the accused,'" *Sandstrom* v. *Montana*, 442 U.S. 510, 523, 99 S.Ct. 2450, 61 L.Ed.2d 39, (1979) (quoting *Morissette* v. *United States*, 342 U.S. 246, 275, 72 S.Ct. 240, 256, 96 L.Ed.2d 288 (1952)), but also because it "'invade[s] [the] factfinding function' which in a criminal case the law assigns solely to the jury," 442 U.S., at 523, 99 S.Ct. at 2459 (quoting *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 446, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978)). . . . A defendant may assuredly insist upon observance of this guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the State. See *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572-573, 97 S.Ct. 1349, 1355-1356, 51 L.Ed.2d 642 (1977). That is also why in *Carpenters* v. *United States*, 330 U.S. 395, 67 S.Ct. 775, 91 L.Ed. 973 (1947), the Court did not treat as harmless a jury instruction that mistakenly did not require express authorization or ratification to hold a union criminally liable for its officers' participation in an antitrust conspiracy—regardless of how overwhelming the evidence that authorization or ratification in fact existed.

Carella v. *California*, 109 S.Ct. 2419, 2421-22 (1989) (concurring opinion).[17] The unchallenged assumption that "the

[17] *See also, e.g. Crane* v. *Kentucky*, 476 U.S. 683, 689 (1986) (jury must be allowed to hear evidence regarding the circumstances of a confession because of their "relevance to the ultimate factual issue of . . . guilt or innocence"); *Patton* v. *United States*, 281 U.S. 276, 312 (1930) ("the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions" that waiver requires consent of the government and the sanction of the court).

truth-finding task [is] assigned solely to juries in criminal cases" (*id.* at 2420) is a thread which runs through centuries of decisions of the courts of England, of this Court,[18] and the lower courts of the United States.[19]

B. This Court's Decisions Regarding Sentencing By Judges in Capital Cases.

In its Response to the Petition here and in its arguments below, Respondent has never addressed this history. Nor has it explained to what issues the Sixth Amendment jury trial right applies, if not the facts of the crime that make a defendant eligible to be considered for a sentence of death. Instead, it has based its defense of the Arizona statute exclusively upon this Court's decisions upholding Florida's death penalty statute, on its face and as applied in *Proffitt* v. *Florida*, 428 U.S. 242 (1976);

[18] *See also, e.g., Press Enterprise* v. *Superior Court*, 464 U.S. 501, 505 (1984) ("The trial of a criminal case places the factfinding function in a jury . . . ."); *Morrissette* v. *United States*, 342 U.S. 246, 274 (1952) ("Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury."); *Sparf* v. *United States*, *supra*, 156 U.S. at 79 ("the proper province and duty of the jury [is] to decide all questions of fact"); *Georgia* v. *Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794) (Jay, J.) ("on questions of fact, it is the province of the jury . . . ."

[19] *See, e.g., United States* v. *Unruh*, 855 F.2d 1363, 1372 (9th Cir. 1987); *United States* v. *Voss*, 787 F.2d 393, 398 (8th Cir. 1986); *United States* v. *England*, 347 F.2d 425, 430 (7th Cir. 1965); *State* v. *Powers*, 154 Ariz. 291, 742 P.2d 792 (1987); *State* v. *Nass*, 76 Wa.2d 368, 456 P.2d 347, 348 (1969); *People* v. *Feagley*, 121 Cal.Rptr. 509, 535 P.2d 373 (1975); *State* v. *Wedge*, 293 Or. 598, 652 P.2d 773, 778 (1982).

Spaziano v. *Florida*, 468 U.S. 447 (1984); and *Hildwin* v. *Florida*, 109 S.Ct. 2055 (1989).

On its face, Florida's statute differs significantly from Arizona's. Florida judges make the ultimate sentencing decision after receiving a jury sentencing recommendation which they may override only in limited circumstances. *Spaziano* v. *Florida*, *supra*, 468 U.S. at 451; *Tedder* v. *State*, 322 So.2d 908 (Fla. 1975). Although the jury's recommendation and the judge's decision are guided by a list of statutory "aggravating circumstances" which resembles Arizona's similarly-denominated list, the statutory function of these aggravating circumstances is significantly different in the two jurisdictions. Under the Florida statute, the determination of "whether sufficient aggravating circumstances exist" is simply one of the "considerations" in the ultimate determination of "whether the defendant should be sentenced to life or death." Fla. Stat. Ann. § 921.141(2). In Arizona, a finding of "one or more of the aggravating circumstances enumerated in" the law is the statutory prerequisite for a death sentence—and it mandates such a sentence unless there are mitigating circumstances "sufficiently substantial to call for leniency." A.R.S. § 13-703(E).

The context in which the Court addressed the constitutionality of the Florida procedures in *Proffitt*, *Spaziano*, and *Hildwin* underscored these differences. In *Proffitt*, the plurality simply noted, in discussing the Eighth Amendment issue before it, that it had "never suggested that jury sentencing is constitutionally required." 428 U.S. at 252. In *Spaziano*, the Court upheld Florida's practice of allowing judges to "override" life-sentence recommendations by juries—once again viewing the issue as whether the Constitution required that juries be given the ultimate power to make the *sentencing* judgment, 468 U.S. at 461-65, and concluding "that there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed . . . ." *Id.* at 465. Throughout this discussion, the *Spaziano* opinion carefully disinguished between "the capital sentencing decision" and the

"trial on guilt or innocence." *Id.* at 461-65.[20] The *per curiam* decision in *Hildwin* simply elaborated on *Spaziano:*

> If the Sixth Amendment permits a judge to impose a sentence of death when the jury recommends life imprisonment, . . . it follows that it does not forbid the judge from making the written findings that authorize a death sentence *when the jury unanimously recommends a death sentence.*

109 S.Ct. at 2056 (emphasis added).

None of these cases involved the stark Sixth Amendment problem presented here. As the Court of Appeals for the Ninth Circuit has observed:

> Never challenging the fundamental principle that criminal defendants are entitled to a jury trial, *see Duncan*, 391 U.S. at 156, 88 S.Ct. at 1451, the Court's examination in *Spaziano* was limited to the constitutionality of judicial "sentencing" and evaluation of "the appropriate punishment to be imposed." 468 U.S. at 458-59, 104 S.Ct. at 3160-61. . . . Sentencing, or the ultimate determination of an appropriate penalty, involves the *weighing* of factors. Such weighing is completely distinct from threshold findings of whether requisite elements even exist from which the trier-of-fact draws conclusions on guilt or innocence.

Adamson v. *Ricketts*, *supra*, 865 F.2d at 1028-9. This Court has similarly emphasized the distinction between finding the facts that make a defendant eligible for the death penalty and assessing the factors that bear upon the ultimate sentencing choice.

---

[20] To a significant extent, the Court's decision in *Spaziano* was guided by concessions of counsel in that case. *See id.* at 457-461. Counsel's arguments never focused the issue in Sixth Amendment terms. The certiorari petition in *Spaziano* raised the claim under the Fifth and Seventh Amendments. *Spaziano* v. *Florida*, No. 83-5596, Petition for Certiorari at i. The arguments made in the petitioner's brief in that case all derived from the Eighth Amendment. *Id.*, Brief of Petitioner at 25-54.

> In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In fixing penalty, however, there is no similar "central issue" from which the jury's attention may be diverted. Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstance, the jury is then free to consider a myriad of factors to determine whether death is the appropriate punishment.

California v. *Ramos*, 463 U.S. 992, 1008 (1983).[21]

All that this Court's cases concerning the Florida statute did or could hold was that judges may make the final sentencing judgment in capital cases, even under statutes which require the sentencer to consider specified aggravating and mitigating circumstances among the "myriad of factors [that] . . . determine whether death is the appropriate punishment." That is very different from the question presented here: whether the Sixth Amendment permits judges alone to resolve the decisive questions of fact that establish that "the defendant falls within the legislatively defined category of persons eligible for the death penalty."

C. The Continued Vitality of the Sixth Amendment.

In *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), the Court upheld a statute which increased the mandatory minimum sentence if a felony involved the visible use of a firearm and which left the factual question of firearm use to the sentencing judge under a preponderance-of-the-evidence standard of proof. The Court's analysis in *McMillan* first made clear that the statutory label placed on the factual issue was not dispositive of the Sixth Amendment's application. 477 U.S. at 87-88.[22] It stressed that the Pennsylvania law

> neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm.

Id. The Court acknowledged that the case might be different "if a finding of visible possession exposed [a defendant] . . . to greater or additional punishment, . . . but it does not." *Id.* at 88.[23] And the Court concluded by acknowledging an "inability to lay down any 'bright line' test in this area." *Id.* at 2419.

This case requires the drawing of a line which, if not bright, is at least firm, lest legislatures be left free to transfer the historic Sixth Amendment factfinding function of the jury to judges. In every conceivable respect but name Arizona's "aggravating circumstances" are the kind of facts traditionally left to juries—facts which spell out the difference between conviction of a greater or a lesser crime. Unlike the finding

---

[21] "[T]he individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant," *California* v. *Brown*, 479 U.S. 538, 545 (1987) (concurring opinion of Justice O'Connor), "largely a moral judgment of the defendant's desert," *Caldwell* v. *Mississippi*, 472 U.S. 320, 340 n.7 (1985).

[22] Justice Stevens' dissenting opinion was even more explicit on this point.

> [I]t would demean the Constitution itself . . . if [constitutional protections] . . . could be avoided by nothing more than a legislative declaration that prohibited conduct is not an "element" of a crime. A legislative definition of an offense named "assault" could be broad enough to encompass every intentional infliction of harm by one person upon another, but surely the Legislature could not provide that only that fact must be proved beyond a reasonable doubt and then specify a range of increased punishments if the prosecution could show by a preponderance of the evidence that the defendant robbed, raped, or killed the victim "during the commission of the offense."

477 U.S. at 102.

[23] The Court in *McMillan* distinguished *Specht* v. *Patterson*, 386 U.S. 605 (1967), on this ground, noting that in *Specht* the post-trial judicial findings increased the "maximum penalty of ten years . . . to an indefinite term to and including life imprisonment. . . ." *Id.*

made by Pennsylvania judges in *McMillan*, the finding of an "aggravating circumstance" under the Arizona statute dramatically "alter[s] the maximum penalty for the crime committed," exposing a defendant to a "greater or additional punishment": the qualitatively more severe punishment of death.[24]

Also unlike the Pennsylvania statute considered in *McMillan*, Arizona law itself provides that "aggravating circumstances" must be proved by competent evidence and found beyond a reasonable doubt. A.R.S. § 13-703(C); *State* v. *Jordan*, 126 Ariz. 283, 614 P.2d 825, 828 *cert. denied*, 449 U.S. 986 (1980). The aggravating circumstances are exclusively delineated by the Arizona death penalty statute, and a finding of even one of those circumstances not only makes the defendant eligible for a death sentence, but also shifts the burden to the defendant to establish "mitigating circumstances sufficiently substantial to call for leniency." A.R.S. § 13-703(D). Thus, to the extent that the scope of the Sixth Amendment is "'dependent on how a State defines the offense that is charged in any given case,'" *McMillan* v. *Pennsylvania*, 477 U.S. at 85, quoting *Patterson* v. *New York*, 432 U.S. 197, 211 n.12 (1977), the State of Arizona has defined the offense of capital murder as first degree murder accompanied by an aggravating circumstance, in everything but name.

> While the statute's nomenclature ("aggravating circumstances") suggests they are mere factors guiding the judge in his or her determination of the appropriate penalty, all other indicators confirm that aggravating circumstances are additional *elements* necessary for a finding that a defendant is guilty of the distinctive offense of *capital murder. Finding aggravating circumstances results in the only crime in Arizona for which a defendant may receive a death sentence.*

---

[24] "Death in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Beck* v. *Alabama*, 447 U.S. 625, 638 n.13 (1980), *quoting Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976).

Adamson v. *Ricketts*, *supra*, 865 F.2d at 1026.

In addition, most Arizona "aggravating circumstances"—including both of those found in this case—are substantively, as well as structurally, equivalent to the kind of factual determinations traditionally made by juries in finding the elements of a criminal offense: they encompass issues of *actus reus* and *mens rea*. *See Knapp* v. *Cardwell*, 667 F.2d 1253, 1267 (9th Cir. 1982), *cert. denied*, 459 U.S. 1055 (1982) (Adams, J., concurring). It has always been axiomatic that "[w]here the intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to a jury." *Morrissette* v. *United States*, *supra*, 342 U.S. at 274. As the Supreme Court of Oregon noted—striking down that state's former death penalty statute because it denied the right to jury trial—there is no more basic conception of an "element of the offense" within the historic province of the jury than those facts which "go to the criminal acts for which the defendant is to be punished" or bear on "the existence of the requisite culpable mental state with which the crime was committed . . . ." *State* v. *Quinn*, *supra*, 623 P.2d at 644. To allow states to withdraw such questions of fact from a jury would be to abandon any limit on the state's power to "redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." *Mullaney* v. *Wilbur*, 421 U.S. 684, 698 (1975). And if there is no such limit, it is hard to imagine what functions the Sixth Amendment reserves to the jury, and "what either necessary or convenient use can be fancied of Juries, or to continue Tryals by them at all?" *Bushell's Case*, *supra*, Vaughn Rep. at 143.

II. THE ARIZONA STATUTE'S MANDATORY PRESUMPTIONS OF DEATH PRECLUDE THE INDIVIDUALIZED SENTENCING REQUIRED BY THE EIGHTH AMENDMENT.

This Court has "reached unanimity on the constitutional significance of individualized sentencing in capital cases . . . ." *Sumner* v. *Shuman*, 483 U.S. 66, 85 (1987); *see Hitchcock* v.

Dugger, 481 U.S. 393 (1987); *Skipper* v. *South Carolina*, 476 U.S. 1 (1986). It has accepted no substitute for the constitutionally requisite "determin[ation] whether the death penalty is appropriate in any particular case." 483 U.S. at 78; *see Woodson* v. *North Carolina*, 428 U.S. 280, 304-5 (1976). It has held that in all capital cases "'the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime.'" *Id.* at 76 n.5, quoting *California* v. *Brown*, *supra*, 479 U.S. 538, 545 (1987) (concurring opinion of Justice O'Connor) (original emphasis); *see Penry* v. *Lynaugh*, 109 S.Ct. 2934 (1989).

The Arizona statute at issue here replaces this individualized determination and moral response with a rigid statutory formula. Under the formula, unless the defendant meets the dual burden of establishing that particular mitigating circumstances exist and persuading the trial judge that those circumstances are "sufficiently substantial to call for leniency," the death penalty is mandatory. A.R.S. § 13-703(C), (E); *State* v. *Jordan*, 137 Ariz. 504, 672 P.2d 169, 173 (1983). Three features of the Arizona procedure interact to make it an inadequate vehicle for fulfilling the state's constitutional obligation to allow its capital sentencers "to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Jurek* v. *Texas*, 428 U.S. 262, 271 (1976).

A. The Burden of Proving Mitigating Circumstances.

The Arizona statute's imposition on the defendant of the burden to establish, by a preponderance of the evidence, "the existence" of mitigating circumstances, plainly "require[s] defendants to bear the risk of nonpersuasion as to the existence of mitigating circumstances in capital cases." *Lockett* v. *Ohio*, 438 U.S. 583, 608 n.16 (1978). Since reserving judgment on that practice in *Lockett*, the Court has never countenanced such a law. Rather, in the wake of *Lockett*, the Court has invalidated a variety of state-imposed restrictions upon the consideration of a capital defendant's evidence in mitigation.

> It is beyond dispute that in a capital case "'the sentencer [may] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Eddings* v. *Oklahoma*, 455 U.S. 104, 110 (1982), *quoting Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion)(emphasis in original). See *Skipper* v. *South Carolina*, 476 U.S. 1, 4 (1986). The corollary that "the sentencer may not refuse to consider *or be precluded from considering* 'any relevant mitigating evidence'" is equally "well established." *Id.* (emphasis added), quoting *Eddings*, 455 U.S., at 114.

Mills v. *Maryland*, 108 S.Ct. 1860, 1865 (1988).[25] Arizona law does not allow mitigating evidence concerning aspects of a defendant's character and offense to be weighed in the balance of life and death unless that evidence establishes the existence of some identifiable "mitigating circumstance" by a preponderance of the evidence.

> [T]he Arizona courts are precluded from weighing evidence of mitigation that, while not satisfying the evidentiary standard, nonetheless may give the sentencer reservations about the appropriateness of imposing a sentence of death.

Adamson v. *Ricketts*, *supra*, 865 F.2d at 1041. Doubts raised by evidence proffered in mitigation cannot be "resolved in favor of the accused." *Mills* v. *Maryland*, *supra*, 108 S.Ct. at 1866-67, quoting *Andres* v. *United States*, 333 U.S. 740, 752 (1948). A sentencer who, like Petitioner's trial judge, acknowledges that the defendant's mental capacity "may have been

---

[25] *Accord*, *Eddings* v. *Oklahoma*, 455 U.S. 104, 114 (1982) ("neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence"); *McCleskey* v. *Kemp*, 481 U.S. 279, 304 (1987) ("[T]he Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence."); *Penry* v. *Lynaugh*, *supra*, 109 S.Ct. at 2951 (the sentencer "must be able to consider and give effect to any mitigating evidence").

significantly impaired" at the time of the crime (see *supra* page 13)but who cannot resolve this question one way or the other because of the notoriously refractory nature of psychiatric evidence (see *Addington* v. *Texas*, 441 U.S. 418, 429-30 (1979)) —is forbidden to take the defendant's possible impairment into account as a reason not to impose a death sentence, even in a case where all of the other factors in mitigation and aggravation are evenly balanced. Nor may the sentencer give "significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense," *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976), if these cannot be fairly characterized as mitigating circumstances. For example, the fact—conceded by the Arizona Supreme Court—that Petitioner Walton did not foresee Mr. Powell's ordeal in the desert, could not be considered in any way as reducing the gravity of the "heinous, cruel or depraved" aggravating circumstance, once the latter circumstance was technically established on other grounds.[26] Moreover, as Justice Marshall explained, in discussing a similar provision of Maryland law:

> [T]he mitigating factors set out in the statute are not matters of historical fact—they are matters of legal and moral judgment. These factors do not "exist," and thus, unlike matters of historical fact, they are not easily proved or disproved. Each one rests on evidence that easily might

[26] The Arizona Supreme Court examined Mr. Powell's physical suffering only for the purpose of determining whether it made out the "heinous, cruel or depraved" aggravating circumstance. The court held that it did not, but that the circumstance was established by Mr. Powell's presumable fear in anticipation of death. See *supra* page 13-14. Once this (or any) aggravating circumstance was established by *any* evidence, it compelled a death sentence in the absence of a finding of some mitigating circumstance by a preponderance of the evidence; and the fact that the *degree* of the aggravation was or was not extreme could not be considered. Lacking separate identity as a mitigating circumstance, the unforeseeability of Mr. Powell's suffering became entirely irrelevant to the appropriateness of a capital sentence under Arizona's mechanistic sentencing formula.

> influence the conclusion that death is proper, even if that evidence does not conclusively *prove* the statutory mitigating factor. For example, the sentencer might be influenced by evidence tending to demonstrate that the defendant acted under substantial duress, or it might even find that the defendant acted under moderate duress. Yet it would not necessarily find that the defendant had proved that he "acted under substantial duress." Similarly, the sentencer might find that the defendant was of impaired mental capacity, but it might not believe that the impairment was substantial at the time of death. Under the statute, the sentencer would find that the defendant had not proved these mitigating factors. As a result, *the sentencer would be prevented from considering any of the evidence adduced in an effort to meet the burden of proof*, because the statute permits consideration only of the factors proved by a preponderance of the evidence. To preclude the sentencer from considering such potentially influential evidence—as does the statute by denying any weight to evidence if the defendant does not convince the jury that a factor "exists" by a preponderance of the evidence—is to bar, as a matter of law, consideration of all mitigating evidence and influence and thus to violate *Lockett* and *Eddings*. Such a result can only enhance "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." 438 U.S., at 605
> . . . .

Stebbing v. *Maryland*, 469 U.S. 900, 902-03 (1984) (opinion dissenting from denial of certiorari) (original emphasis).

B. The Statutory Presumption in Favor of Death.

Not only must Arizona capital defendants establish that particular mitigating circumstances exist, but they must show that these circumstances are "sufficiently substantial to call for leniency." A.R.S. § 13-703(E). This statutory language tells an Arizona sentencing judge who finds even a single aggravating factor, that death must be imposed, unless—as the Arizona Supreme Court put it in Petitioner's case—there are "outweighing mitigating factors." J.A. 94. In *Adamson* v. *Ricketts*, the Ninth Circuit succinctly described this system:

> Under the statute, once any single statutory aggravating circumstance has been established, the defendant must not only establish the existence of a mitigating circumstance, but must also bear the risk of nonpersuasion that any mitigating circumstance will not outweigh the aggravating circumstance(s). . . . The relevant clause in the statute—'sufficiently substantial to call for leniency'—thus imposes a presumption of death once the court has found the existence of any single statutory aggravating circumstance.

865 F.2d at 1041-2 (footnotes omitted). As Judge Hill wrote for a panel of the Eleventh Circuit, holding invalid a similar "presumption of death" in a jury instruction in a Florida case:

> Presumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect. [citations omitted]. When such a presumption is employed in sentencing instructions given in a capital case, the risk of infecting the jury's determination is magnified. An instruction that death is presumed to be the appropriate sentence tilts the scales by which the jury is to balance aggravating and mitigating circumstances in favor of the state.

Jackson v. *Dugger*, 837 F.2d 1469, 1474 (11th Cir.), *cert. denied*, 108 S.Ct. 2005 (1988). Whether given by instruction or statute, to a jury or a judge, such a presumption "is so skewed in favor of death that it fails to channel . . . sentencing discretion appropriately." *Id.*

This statutory thumb on the scales of justice in Arizona capital cases adds to the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett* v. *Ohio*, *supra*, 438 U.S. at 605 (plurality opinion). It does so in a manner inconsistent with the "evolving standards of procedural fairness," *Gardner* v. *Florida*, 430 U.S. 349, 357 (1977) (plurality opinion), in the administration of capital punishment in this country. *See Woodson* v. *North Carolina*, *supra*, 428 U.S. at 289-301.

> "This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions . . . ."

Id. at 356-7, quoting *Williams* v. *New York*, 337 U.S. 241, 247-48 (1949). This Court's experience, reviewing vast numbers of homicide cases, has led it to assume that there will be "'few cases in which [the death penalty] is imposed [and] . . . many cases in which it is not.'" *Gregg* v. *Georgia*, 428 U.S. 153, 198 (1976) (plurality opinion), quoting *Furman* v. *Georgia*, 408 U.S. 238, 313 (1972) (concurring opinion of Justice White). The actions of decisionmakers in death penalty cases across the country, reflecting contemporary standards, confirm this as a longstanding national pattern.[27] Yet the Arizona statute presumes that the death penalty should be imposed on every defendant eligible to receive it—at the same time making death-eligible a spectrum of homicides at least as broad as the Constitution allows. See *Tison* v. *Arizona*, 481 U.S. 137 (1987). Only a handful of other states' capital punishment statutes contain such a sweeping, mandatory presumption in favor of death. We have summarized all the laws of which we are aware, in Appendix B to this Brief. As it shows, although a number of state laws contain a balancing formula which, in effect, creates a presumption in favor of death, only eight (including Arizona) do so in a context where a negative answer *requires* a death sentence if any aggravation is shown. And the laws of only two of those states—Arizona and Maryland—simultaneously preclude the weighing of mitigating evidence unless it establishes some particular mitigating circumstance by a "preponderance of the evidence."

We submit in the preceding and following subparts of this section that Arizona's restriction on the weighing of mitigation and the mandatory form of its law separately render it invalid under the Eighth Amendment precedents. Combined with the presumption of death, those features of this law "place[] the risk of error squarely on the defendant's shoulders." *Stebbing* v. *Maryland*, *supra*, 469 U.S. at 907 (Justice Marshall, dis-

---

[27] *See, e.g., BEDAU, THE DEATH PENALTY IN AMERICA 29-64 (3d ed. 1982); NANKELL & HARDY, THE ARBITRARINESS OF THE DEATH PENALTY 2 (1987).*

senting from denial of certiorari). With an interest of transcending value at stake, a capital defendant cannot be constitutionally made to shoulder "such an excruciating burden." *Id.*

C. The Removal of Sentencing Discretion.

The Arizona statute is explicitly mandatory: it provides that the sentencer "shall" impose a death sentence whenever a single aggravating circumstance is found and the defendant fails to meet his statutory burdens of proof. A.R.S. § 13-703(E). The Arizona Supreme Court has repeatedly confirmed that

> [w]here one or more statutory aggravating circumstance is found, and no mitigation exists, the statute *requires* the death penalty.

State v. *Gretzler*, 135 Ariz. 42, 659 P.2d 1, 13 *cert. denied*, 461 U.S. 971 (1983) (emphasis added).

> [U]nder A.R.S. § 13-703(E), the trial court *must* impose a sentence of death if it finds the existence of one statutory aggravating factor and does not find the existence of any mitigating factor (or one or more mitigating circumstances substantial enough to call for leniency).

State v. *Beaty*, 158 Ariz. 232, 762 P.2d 519, 533-34 (1988) *cert. denied*, 109 S.Ct. 3200 (1989) (original emphasis).

There is no place in Arizona law for the sentencer to inquire whether a given crime was sufficiently aggravated to warrant this presumption of death; the same presumption applies if there is one aggravating factor or many, and regardless of the fact that the particular aggravating circumstance "may not be sufficient to render death an appropriate sentence," *Sumner* v. *Shuman*, *supra*, 483 U.S. at 80. The *appropriateness* of the death penalty for an individual offender is simply not in issue. The Arizona Supreme Court has made this clear:

> A death sentence is thus required *regardless of the trial court's belief that a life sentence is appropriate.*

State v. *Beaty*, *supra*, 762 P.2d at 533-34. (emphasis added). The statute plainly and completely "removes the sentencing judge's discretion . . . ." *Adamson* v. *Ricketts*, *supra*, 865 F.2d at 1042-3.

This offends the clearest principles this Court has set down since *Woodson* v. *North Carolina*. As Justice Stevens noted in reference to a much less rigid statutory scheme than this one:

> [The sentencer] might answer both of [the statutory] . . . questions affirmatively and yet feel that a comparison of the totality of the aggravating factors with the totality of the mitigating factors leaves it in doubt as to the proper penalty. But the death penalty can be constitutionally imposed only if the procedure assures reliability in the determination that "'death is the appropriate punishment in a specific case.'" *Lockett* [v. *Ohio*], *supra*, [438 U.S.] at 601 (plurality opinion), quoting *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, J.J.).

Pinch v. *North Carolina*, 459 U.S. 1056, 1057 (1982) (opinion respecting denial of certiorari).

Since those comments were made, the constitutional requirement of an "individualized assessment of the appropriateness of the death penalty" has been reiterated time and again. *Penry* v. *Lynaugh*, *supra*, 109 S.Ct. at 2946.[28] That is not what this law allows.

> While the statute does require balancing, it nonetheless deprives the sentencer of the discretion mandated by the Constitution's individualized sentencing requirement. This is because in situations where the mitigating and aggravating circumstances are in balance, or, where the

---

[28] *See also, e.g.*, *Sumner* v. *Shuman*, *supra*, 483 U.S. at 73-76; *Franklin* v. *Lynaugh*, 108 S.Ct. 2320, 2332-33 (1988) (concurring opinion of Justice O'Connor); *McCleskey* v. *Kemp*, *supra*, 481 U.S. at 310 n.32; *Booth* v. *Maryland*, 482 U.S. 496, 502 (1987); *Baldwin* v. *Alabama*, 472 U.S. 372, 380 (1985); *Caldwell* v. *Mississippi*, *supra*, 472 U.S. at 330-31.

> mitigating circumstances give the court reservation but still fall below the weight of the aggravating circumstances, the statute bars the court from imposing a sentence less than death. Thus, the presumption can preclude individualized sentencing as it can operate to mandate a death sentence . . . .

Adamson v. *Ricketts*, *supra*, 865 F.2d at 1043 (footnotes omitted). As the Arizona Supreme Court has itself written, "[t]he statute takes the human element out of the imposition of the death penalty." *State* v. *Beaty*, *supra*, 762 P.2d at 534.

If the Eighth Amendment requires procedures which insure "that the sentencer has treated the defendant as a 'uniquely individual human bein[g]' and has made a reliable determination that death is the appropriate sentence," *Penry* v. *Lynaugh*, 109 S.Ct. 2947, quoting *Woodson* v. *North Carolina*, *supra*, 428 U.S. at 304-05, it cannot permit a process that so inflexibly "excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." *Id.* at 428 U,S. 304.

D. The Application of the Statute in this Case.

Petitioner's death sentence illustrates the mechanistic operation of Arizona law.

Bluntly stated, this was a borderline capital case. We do not denigrate its seriousness. But as capital cases go—in Arizona and elsewhere—Petitioner's crime was relatively unaggravated. There was mitigating evidence—a 20-year-old defendant, a history of drug abuse and sexual abuse as a child, a confession, expressions of remorse—but it was less than overwhelming, and some of it was disputed. See *supra* pages 10-12. On such an equivocal record, the trial court's imposition of a death sentence was driven by the Arizona statutory formula.

Once the court found a single aggravating circumstance, the burden automatically shifted to the defense. The sentencing judge "considered" mitigation only within this statutory framework. J.A. 56. He acknowledged that one statutory mitigating circumstance "may have" existed but he made no finding that that factor or any others did exist. *Id.* simply concluded there were "no mitigating circumstances sufficiently substantial to call for leniency" and "[t]herefore" imposed the sentence of death. J.A. 57.

Nowhere did the court state that death was the appropriate punishment for Jeffrey Walton's crime. Nowhere did it express any judgment on "whether his "disadvantaged background, . . . emotional and mental problems [made him] . . . less culpable . . . ." *Penry* v. *Lynaugh*, *supra*, 109 S.Ct. at 2947. It simply plugged him into a formula, and the readout said "death." It had no power or discretion to do otherwise.

This was not a process "humane and sensible to the uniqueness of the individual." *Eddings* v. *Oklahoma*, 455 U.S. at 110. In an effort to achieve consistency in death sentencing, the Arizona statute goes too far; "by ignoring individual differences" it produces "a false consistency." *Id.* at 112. Petitioner's sentence, imposed under that statute, violates the Eighth Amendment.

III. THE APPLICATION OF ARIZONA'S "HEINOUS, CRUEL OR DEPRAVED" AGGRAVATING CIRCUMSTANCE TO THE FACTS OF THIS CASE VIOLATED THE EIGHTH AMENDMENT PRINCIPLES OF *GODFREY* v. *GEORGIA* AND *MAYNARD* v. *CARTWRIGHT*.

A "central tenet of Eighth Amendment law" is that capital punishment statutes must provide a "principled means . . . to distinguish those that received the penalty from those that did not." *Maynard* v. *Cartwright*, 108 S.Ct. 1853, 1858 (1988). In *Maynard*, the Court applied this rule to hold invalid Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance, as construed and applied by the Oklahoma courts.

Petitioner's death sentence followed an almost identical finding that his crime was "especially heinous, cruel or depraved."

J.A. 56. After an exhaustive examination of the language and history of this Arizona aggravating factor in *Adamson* v. *Ricketts*, *supra*, 865 F.2d at 1029-1039, the Ninth Circuit has found it indistinguishable in all respects from the Oklahoma law at issue in *Maynard*.[29] Arizona's open-ended interpretation and irregular application of the provision—both before *Adamson* and since—make this conclusion inescapable.[30]

A. The Arizona Statutory Language Places No Restraint on the Sentencer's Decision.

Arizona, like Oklahoma, has defined its catchall statutory aggravating circumstance in impossibly vague language. The terms of the statutes are nearly identical. Arizona uses the phrase "especially heinous, cruel or depraved." A.R.S. § 13-703(F)(6). Oklahoma used the phrase "especially heinous, atrocious, or cruel." *Maynard* v. *Cartwright*, *supra*, 108 S.Ct. at 1859. As this Court noted, "an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" *Id.*

Like the Oklahoma courts, the Arizona courts have given a disjunctive reading to their statute; "a finding of any one of those three factors suffices to constitute an aggravating circumstance. *State* v. *Libberton*, 141 Ariz. 132, 139, 685 P.2d 1284, 1291 (1984)." J.A. 99. Accordingly, a defendant qualifies

---

[29] The Arizona Supreme Court has discussed *Maynard* only once, in *State* v. *Vickers*, 159 Ariz. 532, 768 P.2d 1177 (1989). In that discussion, it simply said: "We believe we have sufficientnly defined the terms 'heinous, cruel and depraved' to prevent the sentencing judge from having unfettered discretion. These terms as applied by the Arizona courts are not void for vagueness." 768 P.2d at 1189.

[30] The same conclusion was reached, well before *Adamson*, by the leading commentator in this area, whose analysis of Oklahoma's state law was heavily drawn upon by the Court of Appeals in *Maynard*. Rosen, *The 'Especially Heinous' Aggravating Circumstance in Capital Cases: The Standardless Standard*, 64 N.C.L.Rev. 941, 968-69 (1986) [hereinafter "Rosen"].

for death under this provision if the trial judge believes that his crime was "especially heinous" or "especially depraved." Surely, "[a] person of ordinary sensibility could fairly characterize almost every murder" in those terms. *Godfrey* v. *Georgia*, 446 U.S. 420, 428-29 (1980).

The Arizona Supreme Court has added to the possibilities for arbitrary application of the "heinous, cruel or depraved" circumstance by placing the following gloss on the statutory language:

> heinous: hatefully or shockingly evil: grossly bad.
>
> cruel: disposed to inflict pain esp. in a wanton, insensate or vindictive manner: sadistic. depraved: marked by debasement, corruption, perversion or deterioration.

State v. *Knapp*, 114 Ariz. 531, 562 P.2d 704, 716 (1977), *cert. denied*, 435 U.S. 908 (1978). As the cases have multiplied in which sentencing judges have found this factor, so have the variety of equally vague phrases used by the Arizona Supreme Court to elaborate it. *See Adamson* v. *Ricketts*, *supra*, 865 F.2d at 1032. This has increased, not decreased, the breadth of the factor and the uncertainty surrounding its meaning. As the Tenth Circuit said with regard to an almost identical state court gloss on the Oklahoma statute, "[v]ague terms do not suddenly become clear when they are defined by reference to other vague terms." *Cartwright* v. *Maynard*, 822 F.2d 1477, 1489 (10th Cir. 1987) (en banc).

> To define depravity, as Arizona does, to mean "marked by debasement, corruption, perversion or deterioration" expands rather than limits the meaning of the aggravating circumstance.

Rosen, *supra*, 64 N.C.L. Rev. at 970.

The Arizona Supreme Court has thus given its trial judges "no more guidance than the 'outrageously or wantonly vile, horrible or inhuman' language that the jury returned in its verdict in *Godfrey*." *Maynard* v. *Cartwright*, *supra*, 108 S.Ct. at 1859. Its pronouncements have added to the grab-bag of

vague labels which, if attached to a crime, can justify condemning the defendant. And, as it noted in this case, it has imposed no requirement that the trial court specify the particular label or labels selected. J.A. 93.

A trial judge is therefore fully authorized to do what Judge Meehan did: to decide that the crime was "grossly bad" or "shockingly evil" or "sadistic" or "perverted" or "marked by debasement" or committed with "a vile state of mind" or a "callous disregard for human life" or "a manifest disregard for the fundamental principles upon which our society is based"[31] —and thereupon to impose a death sentence, quoting the statute, without ever explaining which of these phrases he thought applied. See J.A. 56. Surely such a procedure provides no assurance that the statute's "application will be kept within identifiable boundaries." Adamson v. *Ricketts*, *supra*, 865 F.2d at 1038.

B. The Arizona Supreme Court's Review of the Application Of This Circumstance Has Provided No Principled Way To Distinguish The Few Cases In Which The Death Penalty Has Been Imposed From The Many In Which It Has Not.

The Arizona Supreme Court's actions in reviewing sentences supported by a "heinous, cruel or depraved" finding have "failed to cure the unfettered discretion of the [sentencing judge] . . . and to satisfy the commands of the Eighth Amendment." *Maynard* v. *Cartwright*, *supra*, 108 S.Ct. at 1859.

"The list of considerations that the Arizona Supreme Court has been willing to use to support one of the three terms that comprise its especially heinous aggravating factor is extremely broad." Rosen, *supra*, 64 N.C.L. Rev. at 981. "Whenever *anything* about a murder has proved offensive, . . . it has approved

[31] These are all terms the Arizona Supreme Court has used to define this aggravating factor or justify its application to a given case. *See Adamson* v. *Ricketts*, *supra*, 865 F.2d at 1032.

[this finding]." *Id.* (original emphasis). "[F]or a finding that a murder was especially heinous and/or depraved the possibilities appear endless." *See Adamson* v. *Ricketts*, *supra*, 865 F.2d at 1035 (compiling cases). A finding that a killing was "cruel" has been approved, if "the victim was conscious for a period of time before an attack . . . or after an attack . . . and suffered from either mental . . . or physical pain." *Id.* at 1034 (citations omitted). The finding will stand whether or not the defendant was "disposed to inflict pain" and whether or not the defendant was even the perpetrator of the offense. *See State* v. *Tison*, 129 Ariz. 526, 633 P.2d 335, 352 (1981) *cert. denied*, 459 U.S. 822 (1982).

Because Arizona trial judges do not particularize their finding or give any reasons for it in specific cases, their "interpretation of [the "heinous, cruel or depraved" circumstance] . . . can only be the subject of sheer speculation." *Godfrey* v. *Georgia*, *supra*, 446 U.S. at 429. The Arizona Supreme Court thus searches the whole record for facts which might justify affirmance.[32] Compare Maynard v. *Cartwright*, *supra*, 108 S.Ct. at 1859. In so doing, like its Oklahoma counterpart, the Arizona court has

> said that the attitude of the killer, the manner of the killing, or the suffering of the victim *can* support this aggravating circumstance, but the court has refused to hold that any one of those factors *must* be present for a murder to satisfy this aggravating circumstance.

Cartwright v. *Maynard*, *supra*, 822 F.2d. at 1491.

Arizona has been unable to provide clearly discernable parameters to establish what kind of conduct falls within the (F)(6) circumstance. The court appears to rely on whatever events are presented to it. The court is therefore free to review

[32] Although the sentencing court's findings usually provide little to review, the Arizona Supreme Court has made it clear it performs its "independent dury of review . . . as an appellate court, not as a trial court." *State* v. *Rumsey*, 136 Ariz. 166, 665 P.2d 48, 55 (1983).

the record for any actions or events that it believes to be especially heinous, cruel or depraved. Given the complete lack of any objective standards that guide the court in its decision-making, and it unlimited authority to consider any and all facts present in a particular case, we can only conclude that the Arizona Supreme Court's attempts to constitutionally narrow the (F)(6) circumstance have failed.

Adamson v. *Ricketts*, *supra*, 865 F.2d at 1036-37.

The result of all this has been predictable: the (F)(6) factor has provided "no principled means . . . to distinguish those that received the [death] penalty from those that did not." *Maynard* v. *Cartwright*, *supra*, 108 S.Ct. at 1858. "[W]ithin the plethora of factors the Arizona Courts may consider there has been much contradiction and inconsistency in the application of the (F)(6) circumstance." *Adamson* v. *Ricketts*, *supra*, 865 F.2d at 1037-38 (describing cases). That is not the result envisioned or permitted by this Court's Eighth Amendment decisions.

C. The Application of The (F)(6) Circumstance in Petitioner's Case Underscores its Constitutional Infirmity.

Nowhere is the unpredictability of the application of the "heinous, cruel or depraved" circumstance more apparent than in Petitioner's case. The facts of Thomas Powell's homicide were sadly unremarkable. The cause of death was a single gunshot wound to the head; the assailant inflicted no other injuries.

Mr. Powell endured unusual suffering because the gunshot wound did not immediately kill him and he survived for several days in the desert. That tragic fact was the whole subject of the prosecution's evidence in aggravation. Tr. 1/26 at 234-42; Tr. 1/27 at 252-57. Although the trial court never specified its findings, its only relevant comment suggests that it accepted this argument. Tr. 1/26 at 233. However, the Arizona Supreme Court held that an (F)(6) finding could *not* be supported on this ground because Mr. "Powell's survival and longevity were neither reasonably foreseeable nor intended . . . ." J.A. 98.[33] It nevertheless assumed that the trial court had made a "finding of cruelty," and it said that such a "finding" was "supported by the mental torment of the victim prior to the shooting rather than the events which took place afterwards." *Id.*[34]

The Arizona Supreme Court did not say why it assumed that the trial court made a "finding of cruelty," nor did it pretend to know on what grounds the trial court would have based such a finding. It merely recited what it called the "ample evidence that Powell suffered substantial mental anguish prior to his death," which it found "sufficient to sustain the trial judge's finding of [the heinous, cruel or depraved] . . . aggravating factor . . . ." J.A. 97, 99, 100.

Part of that "evidence" was the Court's assumption that Mr. Powell's "fears for his life must have multiplied" while in the car with the robbers. *Id.* It based this assumption on the sequence of events[35] and Sharold Ramsey's testimony that she "told him

---

[33] The Arizona court upheld a cruelty finding because a victim's unintended survival was "reasonably foreseeable," in *State* v. *Adamson*, 136 Ariz. 250, 665 P.2d 972, 988 *cert. denied*, 464 U.S. 865 (1983). In other cases, it has held that a specific intent to cause pain is required. *See, e.g.*, *State* v. *Lujan*, 124 Ariz. 365, 604 P.2d 629, 636 (1979): "For a killing to be especially cruel, the perpetrator must senselessly or sadistically inflict great pain on his victim."

[34] The Arizona Supreme Court separately said that "[s]ome circumstances suggest that the present defendant also committed the offense in a depraved manner," so "the evidence also supports the finding of depravity." J.A. 99, 100. Again, the court did not specify how it concluded that the trial court had made such a finding; and the only "circumstance" it pointed to was Ms. Ramsey's one-line testimony that Petitioner had said "he never seen a man pee in his pants before." *Id.*

[35] There was no testimony that Mr. Powell expressed fear in the car. Sharold Ramsey testified he was acting "[j]ust scared"; when pressed on how she knew, she said, "I don't know, you could just tell, I guess." J.A. 23.

not to be scared because he wouldn't be hurt." J.A. 24. Acknowledging that Ms. Ramsey's assurance may have given Mr. Powell "temporary refuge," the Court stated: "he soon realized that they meant to kill him." J.A. 97. It justified this statement by a description of the "evidence" that is unsupported by the testimony in every important particular.[36]

We assume that an appellate court cannot "cure the unfettered discretion of the [sentencer] . . . and . . . satisfy the commands of the Eighth Amendment," *Maynard* v. *Cartwright*, *supra*, 108 S.Ct. at 1859, by misreading the record.[37] But even if the Arizona Supreme Court's statement of the facts were accepted, it would not help "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant* v. *Stephens*, *supra*, 462 U.S. at 877. Numerous other Arizona murder defendants have committed crimes which plainly terrified their victims at least as much as this one did,[38] or made after-the-fact

[36] The Court's opinion says "[t]he defendant and Hoover forced Powell to lie face down on the ground"; Ramsey testified, "he got out of the car and then I guess he just got back down on the ground, I don't remember" (J.A. 24). The opinion says that, as Mr. Powell lay there, Petitioner and Hoover "argued over his fate"; Ramsey testified they "were just arguing about what they were going to tie him up with or whatever. . . ." J.A. 24. The opinion says that, when Petitioner "marched Powell off into the darkness . . . the implication was clear to Powell, who was so upset that he urinated on himself and begged the defendant not to kill him"; there was no evidence when and why Mr. Powell urinated on himself — and no one testified that he begged for his life to Petitioner, or anyone, at that time, or anytime.

[37] If, as we submit, Petitioner's death sentence rests on unreliable factual predicated, it is constitutionaly invalid on that account alone. *Johnson* v. *Mississippi*, 108 S.Ct. 1981 (1988). Of course, that issue is not before the Court on this petition.

[38] For example, see the following cases involving first degree murders which the Arizona courts did not find to be "cruel" although the victims clearly anticipated their deaths: *State* v. *Rankovich*, 159 Ariz. 116, 765 P.2d 518 (1988); *State* v. *Carr*, 154 Ariz. 468, 743 P.2d 1386 (1987); *State* v. *Vaughn*, 147 Ariz. 28, 708 P.2d 453 (1985); *State* v. *Poland*, 144 Ariz. 388, 698 P.2d 183 (1985); *State* v. *Nash*, 143 Ariz. 370, 694 P.2d 222 *cert. denied*, 471 U.S. 1143 (1985); *State* v. *Cruz-Mata*, 138 Ariz. 370, 674 P.2d 1368 (1983); *State* v. *McGuire*, 131 Ariz. 93, 638 P.2d 1339 (1981); *State* v. *Ring*, 131 Ariz. 374, 641 P.2d 862 (1982); *State* v. *Rhymes*, 129 Ariz. 56, 628 P.2d 939 (1981); *State* v. *Watkins*, 126 Ariz. 293, 614 P.2d 835 (1980); *State* v. *Lujan*, 124 Ariz. 365, 604 P.2d 629 (1979); *State* v. *Austin*, 124 Ariz. 231, 603 P.2d 502 (1979) *cert. denied*, 446 U.S. 911 (1980);*State* v. *Ferguson*, 119 Ariz. 55, 579 P.2d 559 (1978); *State* v. *Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978) *cert. denied*, 440 U.S. 924 (1979); *State* v. *Cookus*, 115 Ariz. 99, 563 P.2d 898 (1977).

statements which showed at least as much insensitivity as Petitioner's,[39] in cases in which no (F)(6) finding has been made. Indeed, just three weeks after this Petition was filed, the Arizona Supreme Court reversed a death sentence imposed for a murder committed during a gas station robbery by a 21-year-old man where the salient facts were indistinguishable from the worst alleged against Petitioner: the defendant "took the victim to the bathroom and made him kneel in front of the toilet and then shot him in the back of the head" and later "boasted" about it to friends. *State* v. *Rockwell*, ____ Ariz. ____, 775 P.2d 1069, 1075, 1076 (1989). No (F)(6) finding was made at trial or on appeal in *Rockwell*, and the fact that there was "only one aggravating circumstance—pecuniary gain," balanced against the defendant's youth and other mitigation, was the explicit ground for reversal. 775 P.2d at 1079.

[39] For example, see the following cases in which the Arizona courts did not find first degree murders "heinous" or "depraved" despite evidence the defendant boasted of his crime: *State* v. *Tucker*, 157 Ariz. 433, 759 P.2d 579 (1988); *State* v. *Lamb*, 142 Ariz. 463, 690 P.2d 764 (1984); *State* v. *Graham*, 135 Ariz. 209, 660 P.2d 460 (1983); *State* v. *Madsen*, 125 Ariz. 346, 609 P.2d 1046 *cert. denied*, 449 U.S. 873 (1980); *State* v. *Williams*, 133 Ariz. 220, 650 P.2d 1202 (1982); *State* v. *Hensley*, 142 Ariz. 598, 691 P.2d 689 (1984).

If there were any doubt before, the application of the (F)(6) circumstance to Petitioner Walton's case has demonstrated its inability to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Godfrey* v. *Georgia*, 446 U.S. at 428. For that reason, too, his death sentence violates the Constitution.

CONCLUSION

The Judgment of the Arizona Supreme Court should be reversed.

Respectfully submitted,

DENISE I. YOUNG
Arizona Capital
Representation Project
A.S.U. College of Law
Tempe, AZ 85287

*TIMOTHY K. FORD
MacDonald, Hoague & Bayless
1500 Hoge Building
Seattle, WA 98104
(206) 622-1604
Attorneys for Petitioner

**Counsel of Record*

APPENDIX

APPENDIX A

Ariz. Rev. Stat. § 13-703 (Supp. 1986). Sentence of death or life imprisonment without possibility of release until the defendant has served a prescribed period of time; aggravating and mitigating circumstances

A. A person guilty of first degree murder as defined in § 13-1105 shall suffer death or imprisonment in the custody of the state department of corrections for life, without possibility of release on any basis until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five years if the victim was under fifteen years of age, as determined and in accordance with the procedures provided in subsections B through G of this section.

B. When a defendant is found guilty of or pleads guilty to first degree murder as defined in § 13-1105, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge in the event of the death, resignation, incapacity or disqualification of the judge who presided at the trial or before whom the guilty plea was entered, shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsection F and G of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

C. In the sentencing hearing the court shall disclose to the defendant or defendant's counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances included in subsection F or G of this section. Any information relevant to any mitigating circumstances included in subsection G of this section may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, but the

admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F and G of this section. The burden of establishing the existence of any of the circumstances set forth in subsection F of this section is on the prosecution. The burden of establishing the existence of the circumstances included in subsection G of this section is on the defendant.

D. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection F of this section and as to the existence of any of the circumstances included in subsection G of this section.

E. In determining whether to impose a sentence of death or life imprisonment without possibility of release on any basis until the defendant has served twenty-five calendar years if the victim was fifteen or more years of age or thirty-five calendar years if the victim was under fifteen years of age, the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

F. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

7. The defendant committed the offense while in the custody of the state department of corrections, a law enforcement agency or county or city jail.

8. The defendant has been convicted of one or more other homicides, as defined in § 13-1101, which were committed during the commission of the offense.

9. The defendant was an adult at the time the offense was committed or was tried as an adult and the victim was under fifteen years of age.

G. Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under the provision of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

5. The defendant's age.

Ariz. Rev. Stat. § 13-1105 (Supp. 1986). First degree murder; classification

A. A person commits first degree murder if:

1. Intending or knowing that his conduct will cause death, such person causes the death of another with premeditation; or

2. Acting either alone or with one or more other persons such person commits or attempts to commit sexual conduct with a minor under § 13-1405, sexual assault under § 13-1406, molestation of a child under § 13-1410, narcotics offenses under § 13-3406, subsection A, paragraph 3, 5 or 6, kidnapping under § 13-1304, burglary under § 13-1506, 13-1507 or 13-1508, arson of an occupied structure under § 13-1704, robbery under § 13-1902, 13-1903 or 13-1904, escape under § 13-2503 or 13-2504 or child abuse under § 13-3623, subsection B, paragraph 1, and in the course of and in furtherance of such offense or immediate flight from such offense, such person or another person causes the death of any person.

B. Homicide, as defined in subsection A, paragraph 2 of this section, requires no specific mental state other than what is required for the commission of any of the enumerated felonies.

C. First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by § 13-703.

APPENDIX B

SENTENCING STANDARDS IN CURRENT CAPITAL PUNISHMENT STATUTES

The following table describes the 37 death penalty statutes currently in force in the United States, on four parameters relevant to the second question presented in this case.

Column 1: *Mitigating Evidence Weighed?* This column describes whether the statute permits the sentencer to weigh all mitigating evidence, regardless of whether the defense meets a burden of proving the existence of some definable "circumstance."

Column 2: *Presumption of Life?* This column describes whether the statute contains a balancing formula which presumes life ("Yes"), or one which presumes death ("No"), or no presumption ("0"). Statutes requiring proof of mitigation "sufficient to call for leniency," or the like, are listed as presuming death.

Column 3: *Sufficient Aggravation Required?* This column describes whether the statute expressly permits the sentencer to inquire whether there are sufficient aggravating circumstances to warrant the death penalty, in the absence of mitigation.

Column 4: *Residual Discretion?* This column describes whether the statute gives the sentencer discretion to impose a life sentence, regardless of any particular statutory formula.

Unless otherwise noted, all descriptions are derived from the text of the statutes, which follows this table.

	Mitigating Evidence Weighed?	Presumption Of Life	Sufficient Aggravation Required	Residual Discretion?
United States				
USC Tit. 21 § 848 (k)	No	Yes	Yes	Yes
States				
ALA. CODE §§ 13A-5-46, 47	Yes	Yes	No	Yes
ARIZ. REV. STAT. § 13-703(C)	No	No	No	No
ARK. STAT. ANN. § 5-4-603(a)	Yes	Yes	Yes	No
CAL. PENAL CODE § 190.3(k)	Yes	Yes	No	No
COLO. REV. STAT. § 16-11-103(2)(a)	Yes	No	No	No
CONN. GEN. STAT. § 53-46a(f)	No*	Yes	No	No
DEL. CODE ANN. Tit. 11, § 4209(d)	Yes	Yes +	Yes	Yes
FLA. STAT. § 921.141	Yes	No	Yes	Yes
GA. CODE § 26-3102	Yes	Yes +	No	Yes
IDAHO CODE § 19-2515(c)	Yes	No	No	No
ILL. ANN. STAT. Ch.38 § 9-1(g)	Yes	No	No	No
IND. CODE ANN. § 35-50-2-9	Yes	Yes	No	Yes
KY. REV. STAT. § 532.025(1)(b)	Yes	0	No	Yes
LA. CODE CRIM. PRO. Art. 905.3	Yes	Yes +	No	Yes

	Mitigating Evidence Weighed?	Presumption Of Life	Sufficient Aggravation Required	Residual Discretion?
States				
MD. ANN. CODE Art. 27, § 413(h)	No	No	No	No
MISS. CODE ANN. § 99-19-101	Yes	No	Yes	Yes
MO. ANN. STAT. § 565-030.4	Yes	No	Yes	Yes
MONT. CODE ANN. § 46-18-305	Yes	No	No	No
NEB. REV. STAT. § 29-2522	Yes	Yes + +	Yes	Yes
NEV. REV. STAT. § 200.030.4	Yes	No	No	Yes
N.H. REV. STAT. § 630:5	Yes	0	No	Yes
N.J. STAT. ANN. § 2C:11-3(c)(3)(a)	Yes	Yes	No	No
N.M. STAT. ANN. § 31-20A2(B)	Yes	0	Yes	Yes
N.C. GEN. STAT. § 15A-2000(b)	No**	No	Yes	Yes
OH. REV. CODE ANN. § 2929.03(D)(2),(3)	Yes	Yes	No	No
OKLA. STAT. ANN. Tit. 21, § 701.11	Yes	No	No	Yes
OR. REV. STAT. § 163.150(1)(b)-(e)	Yes	Yes + + +	No	No
PA. STAT. ANN. Tit. 42, § 9711(f)	No	Yes	No	No
S.C. CODE ANN. § 16-3-20(C)	Yes	Yes +	No	Yes

States	Mitigating Evidence Weighed?	Presumption Of Life	Sufficient Aggravation Required	Residual Discretion?
S.D. CODE. LAWS § 23A-27A-4	Yes	Yes +	No	Yes
TENN. CODE ANN. § 39-2-203(f)	Yes	No	No	No
TX. CODE CRIM. PRO. Art. 37.071	Yes@	Yes + + +	No	No
UTAH CODE ANN.# § 76-3-207(3)	Yes	Yes	No	Yes
VA. CODE § 19.2-264.4.C	Yes	0	No	Yes
WA. REV. CO. DE. § 10.95.060(4)	Yes	No	No	No
WYO. STAT. § 6-2-102(d)	No	0	No	Yes

*See *State* v. *Daniels*, 207 Conn. 374, 542 A.2d 306 (1988).

**See *State* v. *Brown*, 320 N.C. 179, 358 S.E.2d 1 (1987)

+ These statutes provide for death sentence only upon affirmative recommendation by jury, but do not otherwise presume life or death.

+ + This statute asks if mitigation "approach[es] or exceed[s] weight" of aggravation.

+ + + These statutes place on the state the burden of proving, beyond a reasonable doubt, affirmative answers to special statutory questions.

#See *State* v. *Wood*, 648 P.2d 79 (Utah 1981).

@ Assumes compliance with *Penry* v. *Lynaugh*, 109 S.Ct. 2934 (1989).

Statutory Text Setting Forth Sentencing Standards

Alabama

Ala. Code § 13A-5-46(e) (1982).

(e) After deliberation, the jury shall return an advisory verdict as follows:

. . .

(3) If the jury determines that one or more aggravating circumstances as defined in Section 13A-5-49 exists and that they outweigh the mitigating circumstances, if any, it shall return an advisory verdict recommending to the trial court that the penalty be death.

Ala. Code § 13A-5-47(e) (1982).

(e) In deciding upon the sentencing, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict . . .

Arkansas

Ark. Stat. Ann. § 5-4-603 (Supp. 1987).

(a) The jury shall impose a sentence of death if it unanimously returns written findings that:

(1) Aggravating circumstances exist beyond a reasonable doubt; and

(2) Aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and

(3) Aggravating circumstances justify sentence of death beyond a reasonable doubt.

California

Cal. Penal Code § 190.3(k) (Deering 1985).

. . . the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose the sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances . . . .

Colorado

Colo. Rev. Stat. § 16-11-103(2) (Supp. 1988).

(2) (a) . . . the jury shall deliberate and render a decision based on the following considerations:

(I) Whether at least one statutory aggravating factor has been proved beyond a reasonable doubt . . .

(II) Whether sufficient statutory mitigating factors or other mitigating circumstances exist which outweigh any statutory aggravating factor or factors and other aggravating circumstances . . .

(b) . . .

(III) In the event that the jury finds at least one statutory aggravating factor has been proved beyond a reasonable doubt, and that there are insufficient statutory mitigating factors or other mitigating circumstances to outweigh any statutory aggravating factor or factors that were proved and other aggravating circumstances that were proved, the jury shall return a sentence of death.

Connecticut

Conn. Gen. Stat. Ann. § 53a-46a(f) (West 1985)

(f) If the jury or, if there is no jury, the court finds that one or more of the factors set forth in subsection (h) exists and that no mitigating factors exist, the court shall sentence the defendant to death. If the jury or, if there is no jury, the court finds that

none of the factors set forth in subsection (h) exist or that one or more mitigating factors exist, the court shall impose a sentence of life imprisonment without the possibility of release.

Delaware

Del. Code Ann. tit. 11, § 4209 (d) (1987).

(d) . . . (1) A sentence of death shall not be imposed unless the jury . . ., where appropriate, finds:

a. Beyond a reasonable doubt at least 1 statutory aggravating circumstance; and

b. Unanimously recommends, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that a sentence of death be imposed.

Florida

Fla. Stat. Ann. § 921.141 (West 1985)

(2) . . . the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) . . . Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Georgia

Ga. Code Ann. § 26-3102 (Harrison 1988).

. . . Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment . . . .

Idaho

Idaho Code § 19-2515(c) (1987).

. . . Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances . . . outweigh the gravity of any aggravating circumstance found and make the imposition of death unjust.

Illinois

Ill. Ann. Stat. ch. 38, para. 9-1(g) (Smith-Hurd Supp. 1989)

(g) . . . If there is a unanimous finding by the jury that one or more of the factors set forth in subsection (b) exists, the jury shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed. If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death . . . .

Indiana

Ind. Code Ann. § 35-50-2-9 (Burns Supp. 1989).

(e) . . . The jury may recommend the death penalty only if it

finds:

. . .

(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

Kentucky

Ky. Rev. Stat. Ann. § 532.025(1)(b) (Baldwin 1984).

(b) . . . the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in subsection (2) of this section, exist and to recommend a sentence for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law.

Louisiana

La. Code Crim. Proc. Ann. art. 905.3 (West Supp. 1989).

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death shall be imposed. . . .

Maryland

Md. Ann. Code art. 27 § 413(h) (1988)

(h). . .

(1) If the court or jury finds that one or more of these mitigating circumstances exists, it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances.

(2) If it finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death. . . .

Mississippi

Miss. Code Ann. § 99-19-101 (Supp. 1989).

(2) . . . the jury shall deliberate on the following matters:

(a) Whether sufficient factors exist as enumerated in subsection (7) of this section;

(b) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(c) Whether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and

(d) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient factors exist as enumerated in subsection (7) of this section.

(b) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section, and

(c) . . . there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances.

Missouri

Mo. Ann. Stat. § 565.030(4) (Vernon Supp. 1989).

4. . . . The trier shall assess and declare the punishment of life imprisonment . . .

(2) If the trier does not find beyond a reasonable doubt that any one or more of the aggravating circumstances listed in subsection 2 of section 565.032, if found, together

with any other authorized aggravating circumstances found, warrant imposing the death sentence; or

(3) If the trier finds the existence of one or more mitigating circumstance is sufficient to outweigh the aggravating circumstance or circumstances found by the trier, or

(4) If the trier decides under all the circumstances not to assess and declare the punishment at death.

Montana

Mont. Code Ann. § 46-18-305 (1987).

. . . In determining whether to impose the sentence of death or imprisonment, the court shall take into account the aggravating and mitigating circumstances enumerated in 46-18-303 and 46-18-304 and shall impose a sentence of death if it finds one or more of the aggravating circumstances and find that there are no mitigating circumstances sufficiently substantial to call for leniency . . . .

Nebraska

Neb. Rev. Stat. § 29-2522 (1985).

. . . . the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:

(1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;

(2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Nevada

Nev. Rev. Stat. § 200.030(4) (1987).

4. Every person convicted of murder in the first degree shall be punished:

(a) By death, only if one or more aggravating circumstances are found and any mitigating circumstances which are found do not outweigh the aggravating circumstances . . . .

New Hampshire

N.H. Rev. Stat. Ann. § 630:5 (IV) (1986).

IV. . . . the jury shall retire to determine the punishment to be imposed. If by unanimous vote the jury finds at least one statutory aggravating circumstance the jury may fix the sentence of death . . . .

New Jersey

N.J. Stat. Ann. § 2C:11-3(c)(3) (West Supp. 1989).

(a) If the jury or the court finds that any aggravating factors exist and that all of the aggravating factors outweigh beyond a reasonable doubt all of the mitigating factors, the court shall sentence the defendant to death. . . .

New Mexico

N.M. Stat. Ann. § 31-20A2. (Supp. 1987).

. . .

B. After weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, the jury or judge shall determine whether the defendant shall be sentenced to death or life imprisonment.

North Carolina

N.C. Gen. Stat. § 15A-2000(b) (1988).

(b) . . .

. . . the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

Ohio

Ohio Rev. Code Ann. § 2929.03(D) (Anderson 1987).

(2) . . . the trial jury . . . shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender shall be sentenced to life . . .

(3) Upon consideration of the relevant evidence . . . if, after receiving pursuant to the division (D) (2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death upon the offender . . . .

Oklahoma

Okla. Stat. Ann. tit. 21 § 701.11 (Supp. 1989).

. . . Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed . . . .

Oregon

Or. Rev. Stat. § 163.150(1)(b)-(e) (1987).

(b) . . . the court shall submit the following issues to the jury:

(A) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result;

(B) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. In determining this issue, the court shall instruct the jury to consider any mitigating circumstances offered in evidence, including, but not limited to, the defendant's age, the extent and severity of the defendant's prior criminal conduct and the extent of mental and emotional pressure under which the defendant was acting at the time the offense was committed; and

(C) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue considered. . . .

(e) If the jury returns an affirmative finding on each issue considered under this section, the trial judge shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this section, the trial judge shall sentence the defendant to imprisonment

for life in the custody of the Department of Corrections as provided in ORS 163.105.

Pennsylvania

Pa. Cons. Stat. Ann. § 9711(c) (Purdon 1982).

(c) Instructions to jury. -

(1) . . . the court shall instruct the jury on the following matters:

. . .

(iii) aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence.

(iv) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances . . . .

South Carolina

S.C. Code Ann. § 16-3-20(C) (Law. Co-op. Supp. 1988).

(C) . . .The jury, if its verdict be a recommendation of death, shall designate in writing, and signed by all members of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding an aggravating circumstance or circumstances beyond a reasonable doubt, shall, in writing and signed by all members of the jury, designate the aggravating circumstance or circumstances if found beyond a reasonable doubt . . . . Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed.

South Dakota

S.D. Codified Laws Ann. § 23A-27A-4 (1988).

. . . a sentence of death shall not be imposed unless the jury verdict at the presentence hearing includes a finding of at least one aggravating circumstance and a recommendation that such sentence be imposed. If an aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death . . . .

Tennessee

Tenn. Code Ann. § 39-2-203(g) (1982).

(g) If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances the sentence shall be death . . . .

Texas

Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1988).

(b) the court shall submit the following three issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death.

Utah

Utah Code Ann. § 76-3-207(3) (Supp. 1989).

. . . If the jury reports unanimous agreement to impose the sentence of death, the court shall charge the jury and shall impose the sentence of death . . . .

Virginia

Va. Code Ann. § 19.2-264.4(C) (1983).

(C) The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravating battery to the victim.

Washington

Wash. Rev. Code Ann. § 10.95.060(4) (Supp. 1989).

(4) Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliber-

ate upon the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

Wyoming

Wyo. Stat. § 6-2-102(d) (Supp. 1989).

(i) . . . the jury shall deliberate and render a sentence based upon the following:

(A) Whether one (1) or more aggravating circumstances exist beyond a reasonable doubt . . .

(B) Whether, by a preponderance of the evidence, mitigating circumstances exist . . . and

(C) The mere number of aggravating or mitigating circumstances found shall have no independent significance.

United States

21 U.S.C.A. § 848 (West Supp. 1989)

(j) . . . The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless established by a preponderance of the evidence.

(k) . . . If an aggravating factor set forth in subsection (n)(1) of this section and one or more of the other aggravating factors set forth in subsection (n) of this section are found to exist, the jury, or if there is no jury, the court, shall then consider whether the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of mitigating factors, whether the aggravating factors are themselves sufficient to justify the sentence of death. . . The jury or the court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose the death sentence and the jury shall be so instructed.